IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, *Petitioner*

v.

RAYMOND J. RYAN

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether an oppressive and imprecise district court order denying respondent's motion to quash a grand jury subpoena duces tecum *and* directing respondent (1) to produce substantially all the "books, records, papers and documents" of two Kenya corporations, (2) to apply to the Registrar of Companies of Kenya

for release of certain records subject to restrictions imposed by Kenya law, and, (3) if such application be denied, to make the records "available to agents of the United States Department of Justice and/or the United States Department of the Treasury" for inspection and copying in Kenya is nonappealable under *Cobbledick* v. *United States*, 309 U.S. 323 (1940), as a denial of a motion to quash a grand jury subpoena duces tecum.[1]

STATEMENT

1. Background

Raymond J. Ryan is a United States citizen who traveled to the United States voluntarily from Kenya, East Africa, to be the principal government witness in a highly celebrated federal criminal trial in 1964. *United States* v. *Marshall*, 355 F.2d 999 (9th Cir.), certiorari denied, 385 U.S. 815 (1966). As a result of the publicity given that trial, Mr. Ryan became the target of an extensive investigation by the Internal Revenue Service. Agents of the Internal Revenue Service were given access, at their request, to the full records of a company owned by Mr. Ryan, and they physically moved into the offices of the company (A. 5). After examining the records of that company and others in which Mr. Ryan had an interest located in California, the Special Agent of the Internal Revenue

[1] Petitioner has included in its brief on the merits a second Question Presented—*i.e.*, "Whether the court of appeals erred in holding the order invalid." That question was not preserved in the petition for certiorari (having been mentioned only in passing in a footnote in the argument, Pet. 8, n. 8), and we believe it is not properly before the Court. See *e.g.*, *Irvine* v. *California*, 347 U.S. 128, 129 (1954). In other words, if the Court affirms the conclusion of the court of appeals that the challenged order is appealable, it should not re-examine the court of appeals' conclusion that the order was void.

Service in charge of the tax investigation wrote a letter to Mr. Ryan, who was then in Kenya, expressing his appreciation for the cooperation theretofore given in the investigation and advising that the IRS also wished to have the opportunity "to examine records relating to your business ventures in Kenya." The letter stated that an IRS representative would be sent to Kenya to examine the records of such business ventures and requested an "assurance that the applicable records will be made available to the examining agent" (A. 24-25). There was no specification in the letter of the "business ventures" in which the IRS agent was interested.

2. The IRS Summonses

On November 18, 1966, an Internal Revenue Service summons was served upon Mr. Ryan's attorney, one Wilbur Dassel (now deceased), requesting the production of substantially all the records of three enumerated Kenya companies—the Mount Kenya Safari Club, Ryan Investments, Ltd., and Mawingo, Ltd.—for the years 1959-1963, 1961-1965, and 1959-1965, respectively (A. 26-35). Mr. Ryan submitted a statement to the IRS in response to this summons and stated therein that the records enumerated in the three extensive attachments to the summons were not within his custody and control (A. 5). He undertook to make a trip to Kenya to obtain the records and reported that his effort had been unsuccessful (A. 5).[2]

On November 21, 1967, another IRS summons was served on Mr. Ryan requesting the production of 1965

[2] In March 1967, Mr. Ryan submitted to the IRS an affidavit reporting the effort he had made and requesting to be relieved from the summons. The affidavit appears in Volume I of the certified record of this case at pages 73-74 and is reproduced in Appendix A to this brief, pp. 3a-5a, *infra*.

records of the Ryan Oil Company, bank records relating the three Kenya companies, and records relating to Mr. Ryan's personal accounts in banks located in the Kenya cities of Nanyuki and Nairobi (A. 20-22).

No steps have even been taken by the government to enforce either of the Internal Revenue Service summonses.

3. The 1967 Grand Jury Subpoenas

On July 27, 1967, while Mr. Ryan was in the United States, he was served with a grand jury subpoena directing him to appear before a federal grand jury on July 28, 1967, and to bring with him "all records, papers and documents pertaining to the operation of Mawingo, Ltd. dba Mount Kenya Safari Club" (A. 15-16). Such of the enumerated records as were available in California were then turned over to Internal Revenue agents (A. 6). A similar subpoena dated August 2, 1967, was thereafter left at Mr. Ryan's office, requesting his appearance and the production of the company records on August 16, 1967 (A. 17-18). Two of Mr. Ryan's employees who were served at the same time appeared on August 16 and testified, and Mr. Ryan was excused by agreement between counsel until some indefinite future date (A. 6).

4. The March 1968 Appearance

Under date of February 2, 1968, the Department of Justice advised Mr. Ryan's attorney by letter that Ryan's presence pursuant to the August 1967 proceeding was requested for February 21, 1968 (A. 23). Since counsel had a conflicting commitment for the February 21 date, it was agreed that Mr. Ryan would appear on March 5, 1968. Mr. Ryan, who was then living in Kenya, returned to the United States at his own expense to be present on March 5.

In a hearing held that morning in the district court, government counsel described what took place in the grand jury room as follows (Transcript of March 5, 1968, pp. 7-8):

> Mr. Joyce: When Mr. Ryan was called into the grand jury he was first called in and sworn and then released and permitted to proceed to the witness room. Then another witness, Mr. William Holden, was called before the grand jury. He described the acquisition of the property known as the Mt. Kenya Safari Company and the acquisition of the stock of the Mawingo Company, Ltd. 80 per cent of the stock was acquired by Mr. Ryan, 10 per cent by Mr. Holden and 10 per cent by Mr. Carl Hershman. [*sic*]
>
> Mr. Holden testified that although he is nominally president of the corporation and Mr. Ryan is the vice president that he as president does not have custody and control over the records but that Mr. Ryan does have such custody and control over the records.[3]

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[3] Mr. Holden's grand jury testimony was subsequently introduced as Government's Exhibit 4 (R. Vol. III, p. 133). An examination of that transcript does not provide any support for the representation made to the court on March 5 that Holden had testified that "Mr. Ryan does have such custody and control over the records." The relevant portion of the Holden testimony was as follows (Ex. 4, pp. 11-12):

> Q. As the President, are you the custodian of the records, the financial records of the Mawingo Limited?
>
> A. No, I am not.
>
> Q. Are there any other officers in the corporation, sir?
>
> A. The designated officers—well, I was designated as President. Mr. Ryan was designated as Vice-President, and Mr. Hirschmann was designated as Secretary-Treasurer.
>
> Q. You say you were designated by yourselves?
>
> A. Yes. We agreed among ourselves.
>
> Q. I didn't hear what was Mr. Hirschmann's—
>
> A. As Treasurer.
>
> Q. Now, do you know who the custodian for the records of

> Mr. Ryan was then brought into the grand jury and asked if he was appearing before the grand jury pursuant to subpoena to bring the records of the corporation before the grand jury. His response was that upon the advice of counsel he refused to answer the question on the ground that the question would tend to incriminate him. He responded in that manner to each and every question directed to him with respect to the production of the corporation records.

He then made the following request (*ibid.*):

> At this point, your Honor, we would respectfully request that the court order the witness to produce before the grand jury on or about April 15, or such other time as the court may direct, the records of the Mawingo, Ltd. doing business as the Mt. Kenya Safari Company. That the corporate rec-

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the Mawingo Limited would be in accordance with your designations and arrangements, sir?

A. I am sure that the custodian of the records is Ryan Investments in Nairobi.

Q. You say Ryan Investments. That would be a corporation?

A. Yes, that's a corporation.

Q. And, who would the person be who would be the custodian of records? It would be difficult for—

A. Mr. Jack Mills who is General Manager of Ryan Investments.

Q. And, he is the custodian of the records?

A. As far as I know, yes.

Subsequently, Mr. Holden was again asked about the affairs of the Mt. Kenya Safari Club (Ex. 4, p. 21):

> Mr. Michael: Were the business affairs—as far as you know, were the business affairs of this club run by yourself, Mr. Hirschmann and Mr. Ryan?
>
> The Witness: Well, actually—
>
> Mr. Michael: As far as giving orders and setting policy?
>
> The Witness: The business affairs were always in the hands of either the attorneys in Nairobi or Mr. Jack Mills who is General Manager of Ryan Investment.

ords be brought from wherever they are to the United States and brought before the grand jury. And that the court direct that he so do upon the pain of either an indictment by the grand jury for contempt of the order of the court or the penalties of civil contempt for refusing to comply with the order of the court. We would so ask the court to direct him at this point.

After further colloquy, the court inquired of government counsel whether he was requesting "this court to order Mr. Ryan to answer questions concerning the records or whether you want this court to order Mr. Ryan to produce those records?" (A. 8). Counsel advised that the government did not "anticipate taking any testimony from Mr. Ryan except insofar as he will identify the records and state his position as the custodian" (*ibid.*) The district judge concluded that he could not order Mr. Ryan to produce records, and that the "proper procedure to do that would be by subpoena rather than by order of the court" (A. 9). Government counsel immediately whipped out a subpoena duces tecum calling for Mr. Ryan's attendance before the grand jury on April 15 (A. 11) and served it upon Ryan in open court. (That subpoena is the one allegedly at issue here.) He then requested the court to issue an order directing Mr. Ryan to comply with the subpoena. The district judge denied that request as premature (*ibid.*).

5. The Terms of the Subpoena

The grand jury subpoena served on March 5 was broader in scope than any of the previous requests for records of business ventures in Kenya. It sought "all books, records, papers, and documents in [Ryan's] possession or under [his] custody and/or control,

either personally or as corporate officer, director, or representative," pertaining to the following five "entities, enterprises or corporations" (A. 11-12):

1. Ryan Investment, Ltd., Nairobi
2. Mount Kenya Safari Club, Nanyuki and Nairobi
3. Mawingo, Ltd., Nanyuki and Nairobi
4. Zimmerman, Ltd., Nairobi
5. Seven-Up Bottling Co., Ltd., Nairobi

It described the documents as "including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities" (*ibid.*).

6. The Motion To Quash

On March 29, 1968, Mr. Ryan's counsel filed a motion to quash the subpoena on seven different grounds.[4]

[4] The following grounds were stated and argued in the supporting memorandum:

1. "The subpoena being unlimited in time and subject matter is oppressive, unreasonable and violative of the Fourth Amendment to the Constitution.
2. "The witness Ryan was immune from service of the subpoena.
3. "The subpoena commands an unlawful act under the laws of Kenya and consequently must be quashed.
4. "The grand jury subpoena is an improper attempt to use the processes of the grand jury to enforce an Internal Revenue summons.
5. "The witness not having custody or control of the documents, the subpoena must be quashed.
6. "Requiring the witness to be responsible for shipping substantial quantities of records from Africa to Los Angeles is oppressive and unlawful.
7. "Since the government has "targeted" Ryan, he should not be compelled to be a witness."

The principal reason stated was that the subpoena was oppressive and unreasonable, and it was also argued that Mr. Ryan was immune from service of process on March 5, 1968, and that it would violate Kenya law to require the records to be transported to the United States. The motion was supported by several affidavits, among them being that of a partner in a Nairobi law firm who stated his opinion that Mr. Ryan's compliance with the subpoena would violate Kenya law (A. 36-38). Other affidavits were submitted by the secretary and a director of three of the companies (R. Vol. I, pp. 39-41, 44-47; reprinted in Appendix B, pp. 6a-10a, *infra*), who stated, *inter alia,* that the records requested "would fill aproximately eight four-door filing cabinets and would weigh approximately 2,000 lbs," that Mr. Ryan had resigned as director of the companies in March 1967 and retained no official capacity with them, that the executive director of the companies (one of the affiants) has custody and control of nearly all the requested records, that Mr. Ryan has neither custody nor "the right to determine to whom the records should be made available," and that requests made by Ryan to have the records sent to California had been turned down.

7. District Court Proceedings

The motion to quash and other issues relating to the government's wish to examine the Kenya documents were the subjects of proceedings in the district court on five dates between April and July 1968. (See Vol. III of the Certified Record.) Mr. Ryan's counsel raised, in oral argument, the fact that the Judicial Code prescribed specific means for obtaining documents located abroad (by subpoena duces tecum under 28 U.S.C. § 1783 and by letters rogatory) which the

government had failed to follow here (R. Vol. III, pp. 70-77), and he observed that with respect to much of the documentary material subpoenaed, removal from Kenya would violate local law (*id.* at 77-79).

He also noted that "there is a question of the capability and the competency of Mr. Ryan to comply with this subpoena" (A. 48), to which the district judge replied that "it is a factual issue" (*ibid.*). In the course of later colloquy, the district judge inquired of government counsel why he was not attempting to obtain the Kenya documents by letters rogatory, and the judge was told—to the surprise of Mr. Ryan's attorney—that the government believed that the Attorney General of Kenya would refuse to cooperate with such a request because of an alleged "close relationship with Mr. Ryan" (A. 49). Two days later "certain cablegrams from the State Department" were submitted to the court for *in camera* inspection in this regard and were "not disclosed to Ryan or his counsel" (A. 73).[5]

Government counsel argued to the district court that Ryan "has a burden of showing or proving the necessity for the remedy which is to quash the subpoena in this case" (R. Vol. III, p. 138).[6] In response

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[5] The opinion of the Court of Appeals which is now on review here referred to this information alleging "Ryan's improper influence upon the Attorney General of Kenya." The court, acting on the record before it, dismissed "the insinuation that the authorities of a friendly foreign power are subject to corruption" (A. 73). Apparently embarrassed with its allegations, the government moved in the Court of Appeals to withhold and strike that portion of the opinion. See Appendix C, pp. 11a-16a, *infra*. The motion was denied.

[6] This argument was made notwithstanding counsel's earlier remark that he "did not understand that this would be an evidentiary hearing" (R. Vol. III, p. 137).

to the government's argument that "there has been no showing on the part of the witness Ryan of any facts which warrant any relief under these circumstances" (*id.* at 139), the district judge said to respondent's counsel, "You have not convinced me yet, I want you to put in everything you want to put in" (*id.* at 140).

On July 12 (the date the "secret" documents were presented to the court), the district judge advised the parties of his "feeling" that Ryan had control of the records and read the language of a proposed order (A. 54-55). The substance of that order was reaffirmed orally on July 25 (A. 59-62), when the written order now at issue was signed (A. 63-64).

8. The Terms of the Order

The order signed by the district judge contained a finding that Mr. Ryan "before and after commencement of the investigation by the Treasury Department and the Department of Justice has had control" of the records and followed that finding with three operative paragraphs which provided as follows:

(a) The first paragraph recited that the motion to quash was denied.

(b) The second paragraph ordered Mr. Ryan to produce before the grand jury on September 11, 1968, the documents of three of the companies enumerated in the subpoena[7] as to which there had been no claim made of violation of foreign law.

(c) The third paragraph directed Mr. Ryan to apply "forthwith" to the Registrar of Companies in Kenya

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[7] The judge advised that he could not order production of the remaining two companies' records because he had received no evidence concerning them (A. 59).

to release the books of account, minute books and membership list for production before the grand jury on September 11, 1968, and, failing the receipt of such permission, to "make available to agents of the United States Department of Justice and/or the United States Department of the Treasury" the enumerated records in Kenya for inspection and copying. A timely notice of appeal from this order was filed (A. 65).

9. The September 1968 Appearance[8]

In addition to noting an appeal from the order of July 25, respondent sought extraordinary relief in the nature of prohibition and a stay from the Court of Appeals. That relief was denied, but the date for Mr. Ryan's appearance before the grand jury was continued to September 23, 1968. An application for a stay made to the Circuit Justice was also denied.

Mr. Ryan then appeared before the grand jury on September 23, 1968, without the requested records. Prior to his appearance, his attorney provided government counsel with a letter outlining the efforts made by Ryan to obtain the desired documents as well as a power of attorney—made out to the Attorney General or his delegate—assigning all right and interest that Mr. Ryan had in the documents (p. 17a-18a, *infra*). During his appearance before the grand jury he was, according to government counsel, "interrogated as to

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[8] Since the proceedings subsequent to the filing of the notice of appeal are relevant in determining the nature of the order under review, we include in our Statement—as did the government—a summary of those proceedings. The transcripts are not a part of the formal certified record, but pursuant to agreement between the parties they are being lodged with the Clerk and the portions which respondent deems particularly relevant appear in Appendix D to this brief, pp. 17a-62a, *infra*.

whether he complied with the order of the court," and he responded by invoking the constitutional privilege against self-incrimination (p. 17a, *infra*).

10. Institution of Civil Contempt

On the morning of September 23, Mr. Ryan's counsel was served by government attorneys with an order to show cause why Mr. Ryan should not be held in civil contempt. After colloquy among counsel and the court—in the course of which the district judge indicated that, in his view, the only defense available in the contempt proceeding would be demonstrated inability to comply arising "after the order" (p. 19a, *infra*)—the hearing on the order to show cause was set for October 2, 1968.

At the hearing of October 2, there was substantial discussion concerning the precise nature of the alleged contempt. Respondent's counsel inquired whether the violation related to the subpoena, the district court's oral instruction or the court's written order (p. 20a, *infra*). The district judge and the government attorney thereafter engaged in a discussion of the precise nature of the charge, in the course of which the following was said pp. 24a-25a, *infra*):

> "The Court: You don't give him notice that it is the modified—or the order of the Court. Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.
>
> Well, it isn't the demands of the subpoena duces tecum that he was under order to comply with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which

were set forth therein, not to the subpoena in its entirety.

Mr. Michael: Well, your Honor, our position is that the subpoena stands as the Court order modified it, and that subpoena has not been changed, it's been altered by the Court's order, and the Court's order refers to the subpoena, and it is specific.

The Court: Mr. Ryan is under specific orders of the Court—not to comply with the subpoena, but to do certain things, and that was the order of the Court. And if it did anything, it supplanted the subpoena duces tecum because the order of the Court made orally to him, which I think there was no question about, he was asked if he understood it, as I recall—

Mr. Michael: That's right, your Honor.

The Court: —and he said he did, and the order was pronounced in his presence as to what he was to do.

Mr. Michael: That's correct.

The Court: And it would be that order that would be the subject of any contempt, not the subpoena duces tecum because the order of the Court supplanted the subpoena duces tecum; and I think he is entitled to have that spelled out."

11. Evidentiary Proceedings

In order to prepare a defense to the contempt proceeding, respondent requested leave to take testimony in Kenya by letters rogatory (by way of deposition on written interrogatories) and that motion was granted with leave to the government to submit cross interrogatories (p. 32a, *infra*). The testimony of two witnesses was also taken before the district judge on October 7, 1968, and December 12, 1968 (pp. 30a-31a, 46a-53a, *infra*).

12. Indictment and Institution of Criminal Contempt

While the evidentiary phase of the civil contempt proceeding was being conducted, the federal grand jury for the Central District of California returned a two-count indictment on December 10, 1968, charging Mr. Ryan with conspiracy and obstruction of justice in relation to the production of records of The Mount Kenya Safari Club.[9] Also on December 10, 1968, on the government's motion, the district judge signed an order amending the earlier show-cause order from civil to criminal contempt (p. 39a, *infra*). In colloquy with counsel on December 12, the district judge made it clear that the contempt proceeding—set for December 16—was not to involve "relitigation" of any of the premises of the order. He said, "that has been litigated, whether or not he had the capacity to get the records prior to the date upon which he was ordered" (pp. 40a-41a, *infra*). He amplified this statement by saying, "the performance [*sic*] of his capacity is only after the order" (p. 41a, *infra*).

13. Consolidation of the Indictment and Contempt

On the suggestion of the district judge before whom the contempt charge was pending (Real, J.), the obstruction-of-justice charge and the contempt case were consolidated in January 1969 and assigned to him (pp. 53a-54a, *infra*). Thereafter, in February, the government filed an amended order to show cause in which it specified that the portion of the order allegedly violated by Mr. Ryan on September 23, 1968, pertained not to the documents whose removal would have violated

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[9] Respondent was found guilty on July 23, 1970, on one count of that indictment, and his judgment of conviction is now on appeal to the United States Court of Appeals for the Ninth Circuit.

Kenya law, but only to the briefs, records, papers and documents other than the books of account, minute books and membership lists (p. 55a, *infra*). There was still, however, no specification as to whether respondent was charged with having violated the written or oral order of the Court (pp. 56a-58a, *infra*) and in colloquy with counsel, the district judge did not clarify the question (p. 58a, *infra*).

14. Appellate Stays of the Trial

The district judge thereafter set December 2, 1969, as the trial date for the consolidated cases. Respondent filed with the court of appeals for a stay of the trial on the contempt charge pending the outcome of the appeal from the order of July 25, 1968, and the application was granted on October 20, 1969. The Court of Appeals' order recited the docket number of the obstruction-of-justice case in its order, and the district judge, concluding that the number had been erroneously transcribed—interpreted the order as applicable only to the contempt case (A. 70). He thereupon set the obstruction-of-justice case for trial in January 1970 (*ibid.*). The court of appeals on the respondent's motion for clarification, indicated that its specification of the obstruction-of-justice docket number had been deliberate and stayed the trial of both cases.

15. The Decision of the Court of Appeals

On May 19, 1970, a unanimous court of appeals in a *per curiam* decision held that the order was appealable as an interlocutory injunction because it directed "that affirmative action be undertaken in another country" (A. 72), and, noting that other arguments which it did not reach were "persuasive", it concluded that

the order was vague and oppressive (A. 72-73). The court thereafter denied petitions to withhold certain portions of the opinion from publication (see pp. 11a-16a, *infra*) and a petition for rehearing *en banc*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), this Court held that a district court order denying a motion to quash a grand jury subpoena duces tecum is not a "final decision" within the meaning of the predecessor to the present 28 U.S. C. § 1291. The Court's reasoning in *Cobbledick* was simple and straightforward. Noting that "judicial administration must not be leaden-footed" if it is to be effective and that "encouragement of delay is fatal to the vindication of the criminal law" (309 U.S. at 325), the Court held that a witness summoned before a grand jury is in the same posture as a witness at trial, and that neither may be permitted to cause "undue interruption" in ongoing proceedings by obtaining appellate review of an order refusing to excuse him from testifying. Relying on *Alexander* v. *United States*, 201 U.S. 117 (1906), which had concluded that an order to testify and produce documents before a court examiner was not appealable, the Court concluded in *Cobbledick* that the harm of halting "further judicial inquiry" (*id.* at 330) justifies withholding appellate review until such time as a subpoenaed witness appears and, if he then refuses to comply with the demand, is cited for contempt.

The government contends that the *Alexander* and *Cobbledick* decisions preclude appellate review of the order entered by the district court in this case. The basis for this claim is, essentially, that the district court did no more than enforce a subpoena and that

the other provisions of the order were merely ancillary to that enforcement. In fact, an analysis of the subpoena and the order demonstrate that they went far beyond the bounds of a subpoena duces tecum as that instrument has always been known to the common law and were, instead, devices whereby an individual was being ordered to engage in conduct which would make certain foreign documents more accessible to government agents. In these circumstances, the order of the district court was not covered by the *Alexander-Cobbledick* rationale, but was, rather, a mandatory injunction appealable immediately under 28 U.S.C. § 1291 or § 1292(a)(1).

1. Notwithstanding the government's repeated characterization of the district court's order as designed to relieve the burden imposed on respondent by the subpoena duces tecum, a comparison of the subpoena and the order show that the district court imposed affirmative obligations not demanded by the subpoena. If the authorization given by Section 1292(a)(1) of the Judicial Code for appellate review of injunctions is to have any meaning at all, it should at least be available to test the validity of an order requiring an individual to travel more than 20,000 miles[10] (at his own expense), obtain 2,000 pounds of documents from a foreign country, make application abroad to an official of that country, and then oversee that access to the documents

[10] The flying distance from Los Angeles to Nairobi (one way) is 10,088 statute miles. Via Pan American Airways, nearly twenty-five almost-continuous flying hours are required, with not less than six intermediate stops. (Los Angeles to New York [2,451 miles]; New York to Dakar [3,487 miles]; Dakar to Monrovia [755 miles]; Monrovia to Accra [722 miles]; Accra to Lagos [254 miles]; Lagos to Entebbe [2,088 miles]; Entebbe to Nairobi [331 miles].)

is given not only to authorized personnel of the grand jury but also to Treasury Department officials. Indeed, if no immediate review of such an order is available, the witness who is subject to it is—like the petitioner in *Perlman*—"powerless to avert the mischief of the order." 247 U.S. at 13.

2. The record in this case demonstrates tellingly how a witness may be unfairly and unconstitutionally pinioned by such an order if it is held unappealable. For the district judge considered his initial decision—which resulted in the July 25 order—as concluding the question of custody and control of the sought records. Consequently, the only factual issue on which he permitted a defense in the contempt stage of this action was whether there had been compliance with the July 25 order. Accordingly, respondent was in imminent danger of imprisonment if he failed to do any of the things enumerated in the order. This view of the district judge demonstrates persuasively that his order—now said by the government to be nonappealable—in fact went substantially beyond the initial subpoena duces tecum and sought to foreclose issues which the respondent was entitled to raise in the contempt action if no more than a motion to quash had been involved.

3. The policies underlying the *Alexander* and *Cobbledick* decisions are inapplicable here because the documents sought by the grand jury were permanently located abroad and were voluminous in quantity. By the very nature of the sweeping demand made by the subpoena duces tecum and the later order of the district court, there had to be extensive interruption in the grand jury proceedings before the documents could be made available to it. In these circumstances—particularly where an individual, rather than a corporation, is

subject to the subpoena and the order and he must personally make arrangements for the transportation of voluminous documents—prompt appellate review of the validity of the order is necessary and desirable, and it does not, in any significant respect, interfere with proper judicial administration.

We do not believe that any issue other than the appealability of the order of July 25 has been preserved by petitioner for review by this Court. Accordingly, if the threshold question is resolved by an affirmance of the court of appeals, that court's decision on the merits is conclusive. If, however, this Court deems it appropriate, notwithstanding the failure to preserve the issue, to consider the merits of the challenges to the order, we believe the result reached by the court of appeals is amply supported by this Court's decisions invalidating vague, overbroad and oppressive demands for documents. There are, in addition, many other grounds—which the court of appeals characterized as "persuasive"—for vacating the order and relieving the respondent of any obligation to comply with its terms.

ARGUMENT

The Court of Appeals carefully evaluated and analyzed the challenged order in this case. Having approximately six months previously dismissed, on the authority of *Cobbledick*, an appeal from an order denying a motion to quash grand jury subpoenas (*Lampman* v. *United States District Court*, 418 F.2d 215 (1969), certiorari denied, 397 U.S. 919 (1970)), the Ninth Circuit nonetheless held the order in this case appealable on the ground that the district court had done "more than deny a motion to quash" (A. 72). Because the order had " directed [Mr. Ryan] to under-

take steps in a foreign country to have * * * documents released by other persons for transportation to this country or for inspection in Kenya by United States agents" (A. 72), the court of appeals determined that the order was closer to a mandatory injunction than to the run-of-the-mill denial of a motion to quash.

In the first portion of this Argument we enumerate the many indicia of this order which demonstrate that it is, in fact, an injunction and not the kind of order contemplated by this Court's decisions in *Alexander* and *Cobbledick, supra.* Our second argument points out, in addition, how far removed even the subpoena here—considering its "breadth, reach, or overseas effect" (factors cited by the court of appeals, A. 72, n. 1)—is from the subpoena which formed the basis of the lower court's orders in *Alexander* and *Cobbledick.* We argue, in other words, that even if the district court had done no more than refuse to quash the sweeping subpoena served on Mr. Ryan, that order would—because of the type of subpoena involved—have been appealable under the various lower-court decisions which have recognized exceptions to *Alexander* and *Cobbledick* for situations in which their policies do not apply.

I.

THE DISTRICT COURT'S ORDER WAS A MANDATORY INJUNCTION WHICH WENT BEYOND ENFORCEMENT OF A GRAND JURY SUBPOENA.

The order entered by the district court appears at pages 63-64 of the Printed Appendix in this Court, and it is plain from even a most superficial examination of it that it goes well beyond the orders involved in *Alexander* and *Cobbledick.* Indeed, only the first two recital paragraphs of the order and its operative first

paragraph would come within the *Alexander-Cobbledick* formula; the remainder constitute nothing less than a mandatory injunction accompanied by a factual finding that forecloses a critical issue which the respondent would ordinarily be entitled to litigate in a plenary proceeding.

Moreover, it appears from the colloquy we have quoted in our Statement (pp. 13-14, *supra*) that even the district judge viewed his order as independent from the subpoena and did not see his action as a bare denial of a motion to quash. It was the district judge who observed, while Mr. Ryan's civil contempt proceeding was pending, that he was "under specific orders of the Court—not to comply with the subpoena, but to do certain things, and that was the order of the Court." (Appendix D, pp. 24a-25a, *infra.*) The court which had issued the order that the government now seeks to characterize as nothing more than the enforcement of a subpoena, stated at the time that "the subpoena duces tecum was used by the Court only in terms of reference to certain documents" and that the court's order "supplanted the subpoena duces tecum" (*ibid.*)

We turn first to paragraph III of the order, which most clearly goes beyond the acceptable scope of the denial of a motion to quash. We then demonstrate that paragraph II, in light of the factual recitation in the third paragraph of the order, was viewed by the district judge as forever foreclosing the critical factual issue in determining whether Mr. Ryan was legally obliged to comply.

A. Paragraph III of the Order Contained No Less Than Five Affirmative Directives and Authorizations Which Went Beyond the Denial of a Motion To Quash.

One of the arguments in the respondent's motion to quash the subpoena was that compliance with regard to many of the documents would violate foreign law. The district court did not, however, direct the party seeking the information—*i.e.*, the United States—to take the steps needed under foreign law to obtain the requested papers. That course—which had been approved in *Application of Chase Manhattan Bank*, 192 F. Supp. 817 (S.D.N.Y. 1961)—was forcefully urged upon the district court several times by respondent's counsel in the course of the hearings on this matter (see A. 45-46, 53-54). Instead, the district judge seized on the opportunity given him by Mr. Ryan's personal presence to add paragraph III to the order and impose the following personal obligations upon him with respect to the records subject to Kenya law:

1. To apply for release of the records to the Registrar of Companies in Kenya;

2. To make the application "forthwith";

3. To make arrangements for the availability of the records (if release is denied) to government agents in Kenya;

4. To make the records available in Kenya not merely to attorneys who are agents of the grand jury, but also to Treasury Department personnel; and

5. To make the records available on an open-ended basis—*i.e.*, not limited to use by the grand jury and subject to the secrecy cloak of Rule 6(e) of the Federal Rules of Criminal Procedure, but for any use the government agents might wish to make of it.

Notwithstanding the government's repeated efforts disingenuously to characterize this portion of the order as a boon to Mr. Ryan,[11] it is patent that it actually imposed substantial additional obligations and hardships on him under pain of contempt sanctions. In the first place, it is clear "that a person cannot be compelled to produce, under a subpoena, a document which is neither in his possession nor under his control." *Traub* v. *United States,* 232 F.2d 43, 47, n. 9 (D.C. Cir. 1955), quoting from *In re Rivera,* 79 F. Supp. 510, 511 (S.D. N.Y. 1948). The most authoritative statement of the rule appeared in this Court's opinion in *United States* v. *Bryan,* 339 U.S. 323, 330-331 (1950) (citations omitted):

> Ordinarily, one charged with contempt of court for failure to comply with a court order makes a

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[11] The first argument heading in the government's brief asserts that the order was "not made appealable by its provisions easing the burden of compliance." (Brief, p. 9). Other references along the same vein are the following:

> ". . . because the district judge [modified] the subpoena . . . in an obvious effort to take account of Respondent's objections and *make compliance less burdensome . . .*" (p. 10)
>
> ". . . the district court in this case *tempered its refusal to quash* . . . with terms *designed to make compliance by Respondent less burdensome.*" (p. 15)
>
> ". . . the subpoena's categorical directive to produce was replaced by the court's *directive to do the best that the circumstances allowed.*" (p. 15)
>
> ". . . the prescribed procedure—obviously aimed at taking account of objections raised by Respondent at the hearing on the motion to quash and *to afford him leeway in achieving compliance* before the return date . . . ." (p. 18)
>
> "Why should it be any different because the *court sought to provide flexibility . . . .*" (p. 20)
>
> ". . . *any ameliorative or clarifying directive,* . . . will render the entire subpoena appealable." (p. 20)

> complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability or is impeding justice by not explaining what happened to them.

The impossibility of complying with the subpoena as to a large portion of the requested records without violating Kenya law would plainly have been a "complete defense" for Mr. Ryan if there had been no other provision in the district court's order than the denial of the motion to quash.[12] In adding paragraph III, therefore, the district court was hardly being "ameliorative" or seeking to "make compliance less burdensome." It was, rather, *adding* obligations to those imposed by the subpoena in order to head off the defense that bringing the records back would violate Kenya law.

Nor can the government truthfully claim that the portion of paragraph III requiring that the records be made available in Kenya to government agents was "ameliorative" or "eased the burden of compliance." If, as was in fact true, permission could not be obtained from the Registrar of Companies for removal from Kenya of the books of accounts, minute books and lists of members, the *only* way for the government to obtain access through Mr. Ryan (if, as the government contends, he had some control over the documents) was to direct him to make arrangements in Kenya. Simply

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[12] It is well-established that a court should not order any party to act in violation of foreign law. See, *e.g.*, *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959); *Application of Chase Manhattan Bank*, 192 F. Supp. 817, 819 (S.D.N.Y. 1961).

ordering him, as the subpoena duces tecum did, to bring the embargoed documents to the United States could not have done the job. Hence rather than "easing the burden of compliance," the challenged order had the effect of using him personally as the government's agent to take measures which the government should have done on its own.

The decisions of this Court and lower federal courts bearing on the definition of mandatory injunctions for purposes of appealability under 28 U.S.C. § 1292(a)(1) demonstrate that paragraph III unquestionably qualifies the ruling of July 25 as such an order. In *Red Star Laboratories Co.* v. *Pabst,* 100 F.2d 1 (7th Cir. 1938), for example, an interlocutory order to certain insurance companies relating to the beneficiaries of life insurance policies was held to be an appealable mandatory injunction because the companies were directed to "remove forthwith" certain named beneficiaries. Observing that the order was "a command unequivocal in its terms," the court found it immediately appealable as an interlocutory mandatory injunction. The same conclusion was reached in *United States* v. *Kovich,* 201 F.2d 470 (7th Cir. 1953). And in *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 75 (1967), this Court, in construing the word "injunction" as used in Rule 65(d) of the Federal Rules of Civil Procedure, defined it as "an equitable decree compelling obedience under the threat of contempt" and included within that definition orders directing affirmative action—in other words, mandatory injunctions.

The government apparently does not deny that paragraph III of the order has all the earmarks of a manda-

tory injunction. Its only argument is that the obligations imposed are "inherent" in any subpoena duces tecum (Brief, p. 16). But there is plainly no similarity between the purely ministerial acts which may be required of any grand jury witness and which the government hypothesizes in its brief and the very substantial and substantive burdens imposed by the order in this case.

The government contends, for example, that the application to the Registrar of Companies in Kenya is no different from the obligation which might be imposed on a witness to remove documents from a bank vault (Brief, pp. 16-17). The analogy is patently flawed because in the government's hypothetical neither the bank nor any other governmental agency has an interest in preventing removal of the documents; hence the removal and transportation is purely ministerial. What if, however, the documents had been impounded and were in the custody of a State court? Could a witness under a subpoena duces tecum be compelled to institute judicial proceedings to obtain their release so he could bring them to a federal grand jury?[13] (Or would the government be obliged to make that application through its own agents and in its own name?)

Moreover, in the government's hypothetical bank-vault situation, a court might well—with the consent of the witness—authorize examination of documents by agents of the grand jury in a remote location where it is clear that the documents *would ultimately be pro-*

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[13] The government says cavalierly that if a subpoenaed witness' documents "are in the custody of another, he must ask that person to surrender them." (Brief, p. 16) If the other person has an adverse claim to the papers, must the witness initiate a lawsuit?

ducible before the grand jury. It does not follow, however, that if the bank has valid and enforceable legal grounds for preventing removal of the documents (as the Registrar of Companies apparently has here), the witness may be compelled by a subpoena duces tecum to make arrangements with the bank for examination of the documents by government agents in the bank's offices. Yet that is precisely what paragraph III of the challenged order does—under the guise of enforcing a subpoena duces tecum.

If Mr. Ryan did not make the requested application—for which was required to travel 20,000 miles at his own expense—he was in danger of imprisonment or fine for contempt. Indeed, under the terms of the order, he was required to lay aside any personal or other plans and make the request "forthwith"—again under pain of contempt sanctions. And if the request was turned down, he would still be liable for contempt penalties if he did not make arrangements abroad for government agents to see what he could not lawfully bring back with him. These are hardly the common incidents of a grand jury subpoena duces tecum. See our discussion of the early common-law cases at pp. 34-35, 39-41, *infra.*

The clearest indication, however, of how much further paragraph III goes than a simple denial of a motion to quash a grand jury subpoena are the conditions it prescribed for the examination in Kenya. Under the terms of paragraph III, access to the records was to be given in Kenya not merely to the grand jury and to "attorneys for the government" within the meaning and policy of Rule 6(e) of the Federal Rules of Criminal Procedure, but also to "agents of * * * the United

States Department of the Treasury" (A. 64). In addition to corroborating one of the contentions made in the motion to quash (*i.e.*, that the grand jury subpoena was being abused in that it was used as a substitute for the unsuccessful Internal Revenue Service summonses), the incorporation of this provision put the order far beyond the underlying grand jury subpoena. For if, as the government contends, the examination in Kenya was designed "to do the best that the circumstances allowed" (Brief, p. 15), it is surprising that the government was to be allowed greater freedom in the persons who would be permitted to see the documents produced than if they had been brought before the grand jury. For in the latter event, even *attorneys* for other federal agencies could not have had access to the documents (*In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962); *United States* v. *General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962)), much less non-attorney agents of the Internal Revenue Service.

The additional fact that the use to which the examination in Kenya could be put was not limited in any way buttresses our argument that there is substantially more to the court's order than enforcement of a grand jury subpoena. Mr. Ryan was under an order—enforceable by contempt—to make records available in Kenya without the slightest safeguard that they would not be used in a thoroughly impermissible way to initiate or sustain civil tax assessments. In similar circumstances involving allegations of abuse of grand jury process to obtain information for treasury agents interested in civil proceedings, the Court of Appeals for the Seventh Circuit directed that "the protective power of the district court" be used "in such detail and di-

rected to such persons as to make it capable of effective enforcement" to prevent such abuse. *In re April 1956 Term Grand Jury,* 239 F.2d 263, 272 (7th Cir. 1956).

B. The Direction in Paragraph II of the Order Based on the Finding That Respondent Had Control of the Records Makes It an Appealable Injunction.

Another aspect of the challenged order which removes it from the class of denials of motions to quash held nonappealable under *Alexander* and *Cobbledick* is the finding made by the district judge that Mr. Ryan had control of the Kenya records and the resulting directive of paragraph II that he bring back to the United States those records not affected by Kenya law. In subsequent proceedings, the government argued, with the apparent agreement of the district judge, that this finding was analogous to the finding of possession and control in bankruptcy turnover orders and that, as was held in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948), the determination of custody and control could not be relitigated in a contempt proceeding arising out of the court's order. (See Appendix D, p. 21a, *infra.*) It follows, we submit, that the order directing respondent to produce the documents is, like the bankruptcy turnover order, immediately appealable, and that its legal validity and evidentiary basis may be challenged in a court of appeals.

The issue in *Maggio* v. *Zeitz, supra,* was whether an individual who had been found by a bankruptcy court to have withheld and concealed assets which he still possessed and who had been ordered to turn over those assets to the trustee in bankruptcy could litigate the question of his possession of the assets in a contempt proceeding instituted when he failed to comply with

the turnover order. This Court, reaffirming the rule of *Oriel* v. *Russell*, 278 U.S. 358 (1929), held that (333 U.S. at 69-70; emphasis added):

> It would be a disservice to the law if we were to depart from the longstanding rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. * * * Every precaution should be taken that orders issue, *in turnover as in other proceedings,* only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. * * * We therefore think the Court of Appeals was right insofar as it concluded that the turnover order is *subject only to direct attack,* and that its alleged infirmities cannot be relitigated or corrected in a subsequent contempt proceeding.

In the present case, respondent raised the matter of his lack of control or custody over the requested documents at the earliest possible time—*i.e.,* in his motion to quash. This timing followed the suggestion made by this Court in *McPhaul* v. *United States,* 364 U.S. 372, 378-379 (1960), and *United States* v. *Bryan,* 339 U.S. 323, 332-333 (1950), where the Court disapproved of the withholding of a witness' claim that documents could not be produced until his trial for contempt. Indeed, respondent's counsel even suggested to the government and the court, along the lines of the *McPhaul* decision, how the government might take "other appropriate steps to obtain the records." 364 U.S. at 379. It would, in these circumstances, be a perversion of justice to hold that by properly raising the matter at a time when other steps could be taken by the government, the respondent was deprived of any appel-

late review of his claim that he does not have control over the documents.[14]

The district judge in this case could, of course, have followed his initial instincts with regard to the question of custody and control and have left that issue for presentation by Mr. Ryan when he appeared before the grand jury (A. 48). Instead of following that course, he decided to hold an evidentiary hearing (at which only affidavits and documents were presented), and he made a deliberate finding that Mr. Ryan had had control over the Kenya documents enumerated in the subpoena "before and after commencement of the investigation by the Treasury Department and Department of Justice" (A. 63). On the basis of this finding, he did not merely deny the motion to quash, but affirmatively ordered Mr. Ryan

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[14] There is, in fact, a great evidentiary gap in the record with respect to control over the records in March 1968, and the government's total proof—on the basis of which the district judge made his finding—can be summarized as follows:

(1) An annual report of Mawingo, Ltd., dated January 3, 1968, showing that Mr. Ryan was not a director and that Ryan Investments, Ltd. was the record owner of 3600 of the 4500 shares of Mawingo, Ltd. (Gov. Exh. 1; R. Vol. III, p. 116).

(2) An annual report of Ryan Investments, Ltd., dated December 29, 1967, showing that Mr. Ryan was not a director and that a Ray Ryan owned 98 of the 100 shares of Ryan Investments, Ltd. (Gov. Exh. 2; R. Vol. III, p. 117).

(3) Affidavits supplied by Mr. Ryan to the Internal Revenue Service in 1966 and 1967 stating that he held stock of Ryan Investments, Ltd. as a nominee and giving Internal Revenue Service permission to use the nominee agreement. (pp. 1a-5a, *infra*).

(4) The grand jury testimony of William Holden which was specific only on the point that one Mills was the custodian of the records of the companies and that one Carl Hirschman "was in charge of the business." (Gov. Exh. 4; R. Vol. III, pp. 142-143). See note 3, *supra*.

to bring to the United States the records other than the "books of account, minute books, and list of members." That order was analogous to a bankruptcy turnover order and was, therefore, appealable.

C. In Combination, the Finding of Control and Paragraphs II and III of the Order Exceeded the Proper Scope of Judicial Enforcement of a Subpoena.

The government's basic argument is that the district court's order of July 25 was merely a "modification" of the subpoena and that such "modification" does not render the order appealable. The government contends that "auxiliary orders" by district judges "to make the subpoena more precise, thereby clarifying or perhaps narrowing the witness' duty" should be encouraged "if for no other reason than to protect a witness from overbroad or oppressive subpoenas." Brief, p. 20.

We do not quarrel with this proposition—except to the extent that it purports to describe this case. Of course, district courts may narrow overbroad subpoenas duces tecum or strike certain specifications if the documents sought should not be produced. And we do not maintain that such action renders the district court's decision appealable. But when—as is true here—the court orders a witness to take action which will make *otherwise unavailable* documents accessible to the government and when it makes conclusive findings on issues of custody and control, it has gone beyond the proper scope of enforcement of a subpoena.

If a court were satisfied, for example, that a subpoenaed witness did not have custody or control over certain documents, but that a close friend of his—with

whom he was influential—did have such custody and control, could the court "modify" a subpoena duces tecum to order the witness to request the documents from the friend or to persuade the friend to make them available? Plainly that would not be a proper "modification," and such an order could be promptly appealed as a mandatory injunction.

It is, of course, true that a witness who is served with a subpoena duces tecum must take "affirmative action" to comply. But we have found no case—and the government has cited none—in which it has been held to be a proper part of the enforcement of the subpoena to direct the witness *how* he is to comply. The subpoena is designed to secure the attendance of the witness and the presence of the documents at a designated time before a designated tribunal;[15] it is not a proper means for coercing individuals to engage in acts, either here or abroad, to make documents accessible for inspection.

Mr. Justice Frankfurter, who was the author of the *Cobbledick* opinion, also joined the dissenting opinion of Mr. Justice Black in *United States* v. *Fleischman*, 339 U.S. 349 (1950), wherein Lord Ellenborough's historic ruling in *Amey* v. *Long*, 9 East 473, 483 (K.B. 1808), regarding the proper reach of a subpoena duces tecum was quoted. Speaking in that case of a situation in which a document sought by a subpoena duces tecum was "in the possession of another, and on that account attainable only through the means or by the

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[15] The government suggests that "auxiliary orders" may be needed to avoid "footdragging." Brief, p. 17. Since a subpoena specifies the date for compliance it hardly seems necessary to have "auxiliary orders" for that purpose.

delivery of such other person," Lord Ellenborough held that it could not be reached by subpoena—"no man being obliged, according to any sense of the effect of such a subpoena, to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena." See also *Munroe* v. *United States,* 216 Fed. 107 (1st Cir. 1914). In reliance on this classic holding, Justices Black and Frankfurter observed (without disagreement over this particular proposition by the majority): "A command to produce is not a command to get others to produce or assist in producing." 339 U.S. at 366.

The plain fact of the matter is that the government is, in this case, using the personal jurisdiction it has obtained over Mr. Ryan to order him to do things which may make certain voluminous records permanently located in Kenya available for government inspection. There is no lack of proper legal procedures for obtaining access to such records. Under 28 U.S.C. § 1783 (a), an American citizen in a foreign country may be subpoenaed and required to produce "a specified document or other thing," and this is the procedure usually used when documents located abroad are sought. On such an application, however, the party requesting production of the document must establish that the production of the "specified document" which is sought "is necessary in the interest of justice," and, "in other than a criminal action or proceeding," the requesting party must also satisfy the court that it cannot "obtain the production of the document or other thing in any other manner." Construing this very statute in light of its history, the Court of Appeals for the Second Circuit concluded in *United States* v. *Thompson,* 319

F.2d 665 (2d Cir. 1963), that "criminal proceeding" does not include a grand jury investigation.[16] Consequently, if Mr. Ryan had custody of these documents and if the government could show that the production of the 2000 pounds of records was "necessary and in the interest of justice" and could not be obtained "in any other manner," it could serve such a subpoena. The clear inference is that it has chosen the easier route because it is unable to meet the statutory standards.

Moreover, the custodians of the records in Kenya are known; their affidavits have been filed with the district court. There is nothing preventing the government from seeking letters rogatory under which inspection of the enumerated records could be secured by service of Kenya process on the custodians residing in Kenya. The government has chosen instead to use Mr. Ryan as its instrumentality to make the records available, and the result of its efforts should not be immune from appellate review prior to the great expenditure of expense and effort which the district court's order requires.

The facts of this case demonstrate the overreaching of which the government is capable. Requiring an individual to be responsible for the safe transportation of 2000 pounds of records half-way around the world is an incredible burden. Equally incredible is that this is required to be done at Mr. Ryan's own expense, there being no advance of funds to defray the cost. If he were an indigent businessman, such an order

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[16] The amendment of 28 U.S.C. § 1783 subsequent to the *Thompson* decision made it possible to subpoena a witness from abroad in other than a "criminal proceeding." It did not, however, alter the definition of that term.

would be unthinkable. Because he has some financial means, the prosecution and district court appeared willing to apply a different standard. We submit that an order which has the effect of this one should be reviewable immediately.

In light of the many provisions of this particular order and the possible penalties to which Mr. Ryan was subject if he failed to abide by it, this is not a situation in which to apply the "historic rule" (as Circuit Judge Friendly put it in *United States* v. *Fried,* 386 F.2d 691, 695 (2d Cir. 1967)) "putting a witness' sincerity to the test of having to risk a contempt citation as a condition to appeal." More is involved here than the witness' "sincerity" since the order might be deemed violated by any of many courses that Mr. Ryan could have taken. In fact, the district judge was ready—as the subsequent proceedings show —to hold Ryan in contempt unless he could show that some circumstances arising *after* the entry of the order made compliance impossible. This ruling placed Mr. Ryan in the same position as the complaining party in *Perlman* v. *United States,* 247 U.S. 7 (1918), where an appeal from an interlocutory order affecting custody of documents was allowed because otherwise the complainant would have been "powerless to avert the mischief of the order, but [would have had to] accept its incidence and seek a remedy at some other time and in some other way." 247 U.S. at 12. If, on the present state of the record, no appeal were allowed in this case from the order of July 25, Mr. Ryan will have been placed in the position of having been powerless to "avert the mischief" of the directive that he travel to Kenya and take the specified actions abroad.

II.

A COURT ORDER ENFORCING A SUBPOENA DUCES TECUM REQUIRING THE PRODUCTION BY AN INDIVIDUAL OF VOLUMINOUS RECORDS PERMANENTLY KEPT ABROAD IS APPEALABLE UNDER ALEXANDER AND COBBLEDICK.

Our initial argument has demonstrated that the district judge did more in this case than merely enforce a subpoena duces tecum, and we contend that the excess portions of his order render the entire decree appealable. We now argue, in addition, that considering the nature of the particular subpoena at issue here, his order would have been appealable even if it had contained no more than the first operative paragraph —*i.e.*, if it had merely refused to quash the subpoena.

We begin with the policies underlying the *Alexander* and *Cobbledick* decisions. In both cases, this Court emphasized the interruption and delay which would ensue if appeals were permitted during a trial or in the course of a grand jury proceeding whenever a witness was subpoenaed and the court overruled his motion to quash the subpoena. The Court recognized in both cases that there was a legitimate interest on the part of the witness in having the validity of the trial court's decision tested on appeal. But it concluded that such review must await the witness' refusal to testify and the citation for contempt. Essentially, what the Court was saying was that the "witness' sincerity [would be put] to the test of having to risk a contempt citation as a condition to appeal." *United States* v. *Fried*, 386 F.2d 691, 695 (2d Cir. 1967).

But this limitation upon the right to obtain appellate review was justified in *Alexander* because the Court was concerned over "unduly impeding the progress of the case" (201 U.S. at 121), and in *Cobbledick*

because an appeal might result in "undue interruption [of] the inquiry instituted by a grand jury" (309 U.S. at 327). Since the subpoena in this case is one which, by its own operation, results in substantial "interruption" and "impedes the progress" of the ongoing proceeding, there is no policy reason here to bar an appeal.

A subpoena duces tecum served on an individual in the United States directing him to bring before a grand jury "all books, records, papers and documents * * * pertaining to" five companies located in Nairobi and Nanyuki, Kenya (A. 11-12) can obviously not be complied with immediately. See note 10, *supra.* Indeed, the government's own recognition of the delay inherent in such mass production of foreign records is demonstrated by the fact that it initially agreed to continue Mr. Ryan's appearance from August 16, 1967, until some distant future date, and that it did not again request his appearance until February 1968—almost five months after the grand jury sitting in August 1967 had been discharged.

On the other side of the balance is the very substantial burden such a subpoena—if it is lawful at all—imposes on a witness. If he is to comply, he must travel abroad, gather together the voluminous papers, and bring them back to the United States. In *Munroe v. United States,* 216 Fed. 107 (1st Cir. 1914), the question was whether a partner of a banking and foreign exchange firm whose principal place of business was Paris, France, could be compelled by a subpoena duces tecum to produce certain paid checks drawn on his firm by a person under grand jury investigation. The partner totally disregarded the subpoena and made no request that the checks be for-

warded from Paris. On reviewing his conviction for contempt, the court of appeals held (216 Fed. at 112):

> . . . He could not lawfully be called upon under a writ of subpoena duces tecum, to sue and labor to the extent of superintending shipment of papers from France to the United States, to have the care and responsibility of them upon arrival, or of being obliged to await the necessities of Atlantic navigation, and to assume all the other incidents of an importation of this character, including the chance of the time of the arrival of the documents and the travel to and from in connection therewith, merely for the per diem of a witness of perhaps only one day attending court, and the mileage from his place of residence to the place of trial.
>
> We make these observations because the amount of responsibility and attention required from the position of the United States, with reference to importing documents from a foreign country, are too great to be lawfully demanded as the result of a subpoena duces tecum upon an ordinary witness; and in doing this we stop short of considering whether, in any event, the service of a subpoena can compel a witness to go outside of the district of his own residence for the purpose of obtaining documents, or for any purpose except traveling to the place of judicial session for which he is compensated, and especially whether a subpoena duces tecum can compel the holder of documents, which, in many cases, may be of very great value, to transport them from one foreign country to a domestic country, and especially across the high seas, with all the perils attaching thereto. No case can be found which justifies a proposition of that character.

To be sure, a subpoena duces tecum may, in certain circumstances, require corporations to produce records which are, at least temporarily, located abroad. The

seminal decision in that regard—relied on by the court of appeals in *Securities and Exchange Commission* v. *Minas de Artemisa,* 150 F.2d 215, 217 (9th Cir. 1945) —is *Consolidated Rendering Co.* v. *Vermont,* 207 U.S. 541 (1908). In that case, however, this Court was careful to point out that the order was issued to "a corporation doing business in the state, and protected by its power, * * * to produce, before a tribunal of the state, material evidence in the shape of books or papers *kept by it in the state,* and which are in its custody and control, *although, for the moment, outside the borders of the state.*" 207 U.S. at 552. (Emphasis added.) The *Consolidated Rendering* case did not involve, in other words, records permanently kept in a foreign jurisdiction.[17]

There is, in fact, substantial doubt whether a subpoena duces tecum can compel the kind of production sought here. In the *Munroe* case, heavy reliance was placed on Lord Ellenborough's ruling in *Amey* v. *Long,* 9 East 473 (K.B. 1808), wherein the then Chief Justice of England held, in essence, that a subpoena duces tecum could only compel a witness to bring with him such items as he then had in his possession. If, as Lord Ellenborough's rule provides, he may not be compelled to "sue and labor" for the items requested in the subpoena, the obligations imposed in this case are, *a fortiori,* beyond the power of a subpoena.

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[17] We recognize that there have been instances in which corporations or banks with foreign branches have been directed to produce records kept abroad. (*E.g., In re Equitable Plan Co.,* 185 F.Supp. 57 (S.D.N.Y. 1960); *In re Grand Jury Subpoenas Duces Tecum,* 72 F. Supp. 1013 (S.D.N.Y. 1947); *In re Harris,* 27 F.Supp. 480 (S.D.N.Y. 1939)). But none of those cases has involved a subpoena served on an individual or a volume of records as large as that in this case.

There have been various factual contexts in which, notwithstanding *Alexander* and *Cobbledick*, lower federal courts have permitted appeals from denials of motions to quash subpoenas. The reasoning behind those decisions—in which the policies of *Alexander* and *Cobbledick* were held inapplicable—applies to this case.

In *First National City Bank* v. *Aristeguiéta*, 287 F.2d 219 (2d Cir. 1960), three banks served with subpoenas duces tecum in extradition proceedings were permitted to take appeals from denials of motions to quash. The same response as the government has given to Mr. Ryan in this case was available there—the banks' representatives could have tested the validity of the subpoenas by refusing to produce the documents and defending against contempt proceedings. Yet both the Second and Fifth Circuits held the district court orders to be final and appealable. 274 F.2d 206, 287 F.2d 219.

Similarly, in *In re Letters Rogatory*, 385 F.2d 1017 (2d Cir. 1967), an appeal was allowed from an order directing two banks to produce documents pursuant to a request under letters rogatory from the Government of India. There, again, each bank official could —as the court observed—have "obtain[ed] review by allowing himself to be cited for contempt" (385 F.2d at 1018), but the banks were permitted to test the validity of the order in the court of appeals without going through that procedure.

In both *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956), and *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959), courts of appeals considered appeals from denials of motions to quash filed by the

"targets" of grand jury investigations with respect to subpoenas served on third parties who were custodians of their records. In the *Schwimmer* case, the court of appeals stated its reasons for considering the appeal in broad terms applicable here (232 F.2d at 860):

> Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final or appealable order. [Citing *Perlman.*]

There have, in addition, been other circumstances in which orders appearing to fall with the *Alexander-Cobbledick* principle have been held appealable. See, *e.g., In re Wingreen Co.,* 412 F.2d 1048 (5th Cir. 1969); *Saunders* v. *Great Western Sugar Co.,* 396 F.2d 794 (10th Cir. 1968); *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (10th Cir. 1965); *McDonnell* v. *Birrell,* 321 F.2d 946 (2d Cir. 1963); *Mosseller* v. *United States,* 158 F.2d 380 (2d Cir. 1946); cf. *Continental Oil Co.* v. *United States,* 330 F.2d 347 (9th Cir. 1964) (either appeal or mandamus).

The lesson of these decisions, we submit, is that the *Alexander* and *Cobbledick* rule is, as the *Cobbledick* decision itself indicated, not inflexible. Where the harm produced by requiring the witness to await a contempt action is considerable and there is little benefit in denying immediate appellate review, an appeal should be permitted.

That is plainly the case with this subpoena. Unlike the ordinary witness who may refuse today to produce some or all of the documents requested by a subpoena and who can, if he is subject to civil contempt, return tomorrow with the records which a court of appeals

orders him to produce, the witness here must examine voluminous documents located abroad, decide which, if any, should be brought back halfway across the world, and litigate with the prospect that, in light of the passage of time, he will be subjected to criminal contempt sanctions rather than civil contempt.[18] A subpoena as sweeping as this one, requiring many weeks or months of effort to achieve compliance and affecting the transportation of voluminous records located overseas, is as severable from the total grand jury investigation as the subpoenas in the extradition and letters rogatory cases.

In this very case, the order of July 25 set the date for compliance as September 11—a month-and-a-half away. Appellate courts have often been called upon to pass expeditiously on orders which are to take effect less than six weeks from the date of entry. The many public school desegregation cases heard in the past few years by this Court and courts of appeals have presented questions which had to be resolved against close time limits, and the same has often been true of reapportionment and voting-rights cases. The need for quick decision has never been thought to justify denial of appellate review, and it should not do so in these circumstances.

There is, finally, no substance whatever to the government's totally unsupported assertion that "if the order at issue here is found to be appealable, it can

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[18] Compare, however, *Shillitani* v. *United States*, 384 U.S. 364, 372, n. 9 (1966), where this Court observed that a district judge must "consider the feasibility of coercing testimony through the imposition of civil contempt * * * [and may] resort to criminal sanctions only after he determine, for good reason, that the civil remedy would be inappropriate."

be predicted with fair assurance that stays will regularly be sought and often obtained." Brief, p. 24. In our Brief in Opposition to the Petition for Certiorari, we challenged the government to cite a *single* other instance of a district court order enforcing a grand jury subpoena by directing a witness to take steps in a remote foreign country to bring back voluminous records. Brief in Opposition, pp. 8-9. The government has yet to cite such a case.

In fact, we submit, the overwhelming weight of precedent—as far back as 1808—demonstrates that such an order has never been deemed to come within the proper definition of a subpoena duces tecum. Hence it would not interfere with lawful and orderly grand jury proceedings if this Court were to affirm the court of appeals' holding that the validity of such an order is reviewable under 28 U.S.C. § 1292(a)(1). Such a ruling would not affect most grand juries and would remit the government, if it wishes to obtain voluminous records from a remote foreign country by service of process upon a United States citizen, to the procedures of 28 U.S.C. § 1783 or to ordinary injunctions reviewable in a court of appeals.[19]

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[19] We demonstrate in our brief argument on the merits of the district court's order that it was patently impermissible and violative of decisions as far back as *Hale* v. *Henkel*, 201 U.S. 43 (1906). The court of appeals properly assumed jurisdiction of the appeal and vacated the order, and this Court should affirm its decision. But we note that even if appellate jurisdiction be lacking, the court below, in similar circumstances, vacated grand jury subpoenas by treating an appeal as an application under 28 U.S.C. § 1651. *Continental Oil Co.* v. *United States*, 330 F.2d 347 (1964). If our argument on appealability be rejected, therefore, the case should be remanded to the court of appeals for its consideration as to the applicability of the All Writs Act.

III.

THE DISTRICT COURT'S ORDER WAS INVALID FOR A VARIETY OF REASONS, INCLUDING ITS UNCONSTITUTIONAL OVERBREADTH AND OPPRESSIVENESS.

Respondent presented to the court of appeals a variety of constitutional and legal grounds for vacating the order of the district court, and the *per curiam* opinion of the court indicates that it found many of the arguments "persuasive" (A. 71). Since we believe that the government has not properly preserved in this Court its present challenge to the decision of the court below on the merits (see note 1, *supra*), we do not think it appropriate to burden this brief with our extended discussions of the various arguments made below.[20] We have, for convenience' sake, set out in the margin the argument headings in our brief before the court of appeals,[21] and we have lodged with the Clerk several copies of that brief.

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[20] In any event, if this Court were to disagree with the conclusion of the court below that "the Order is vague and overly broad" (A. 71), the case should be remanded to the court of appeals for its consideration of the other challenges to the order. *See, e.g., United States* v. *Beach*, 324 U.S. 193 (1945); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *Chaunt* v. *United States*, 364 U.S. 350 (1960); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).

[21] I. Ryan Was Immune From Service or Process

A. A Witness Coming Into the United States To Attend a Judicial Proceeding Is Immune From Process

B. The Subpoena Was a Patent Attempt To Avoid the Requirements of 28 U.S.C.A. § 1783

C. Subpoena Cannot Compel the Action Commanded Here

D. Service in the Presence of the Court Was Improper

II. The Unlimited Scope of the Subpoena Violates the Fourth

With respect to the ground for vacating the order on which the court of appeals relied, we believe it to be amply supported by decisions of this Court and lower federal courts. No matter how narrowly the government now wishes to construe the order (Brief, pp. 28-30), it calls for the delivery to the United States (or production in Kenya) of *all* the "records, papers and documents" of two Kenya corporations—one which had been in existence "for less than seven years" and the other—incorporated in 1938—"covering a period of under ten years" (Brief, p. 30). This sweeping demand is plainly covered by the language of Mr. Justice Holmes for a unanimous Court in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924):

> It is contrary to the first principles of justice to allow a search through all the respondent's rec-

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Amendment, Particularly Since the Documents Are 10,000 Miles Away.

III. The Subpoena and Court Order Require Petitioner To Violate the Laws of Kenya

IV. Petitioner Did Not Have Custody and Control; the Finding Was Not Supported by the Evidence

V. The Grand Jury Subpoena in Issue Is an Improper Attempt To Enforce an Internal Revenue Service Summons

VI. The Order of July 25 Is Not a Lawful Order

- A. The Order of July 25 Is Void for Non-Compliance With Federal Rule of Civil Procedure 65(d)
- B. The July 25 Order Never Became Effective Since It Was Never Entered as Required by Rule 79(a)
- C. The Order of July 25 Does Not Comply With 28 U.S.C.A. § 1691 and Is Void

VII. The July 25 Order Commanding Ryan To Comply With the Subpoena Violates His Fifth Amendment Rights Against Compulsory Self-Incrimination

VIII. Submission of Secret Documents to the Court Deprived Ryan of His Right to a Due Process Hearing

> ords, relevant or irrelevant, in the hope that something will turn up. * * * A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced.

The order in this case is squarely covered by the leading decision of this Court in *Hale* v. *Henkel,* 201 U.S. 43, 75-77 (1906), where a similar subpoena duces tecum was held to be as invalid "as a search warrant would be if couched in similar terms." It is totally inconceivable that a court would ever sustain a search warrant which called for the seizure of "all books, records, papers and documents of Ryan Investment, Ltd. of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as the Mount Kenya Safari Club." The fact that, in certain major antitrust investigations cited in the government's brief (p. 30), a greater weight of documents than 2,000 pounds was deemed relevant to the particular grand jury inquiries at issue is of no precedential value here. In each of those cases, the documents sought were specified with particularity, and their relevance to the inquiry was established to the satisfaction of the court.[22] In the present case, the order seeks literally every scrap of paper held by the two corporations in the ordinary course of their business. Nothing could conceivably be more of a general search.

Moreover, the government made absolutely no effort to establish to the court below how this wholesale de-

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[22] In *In re Eastman Kodak Co.,* 7 F.R.D. 760, 764 (W.D.N.Y. 1947), for example, the district judge noted that "[i]n this particular type of investigation it must be seen that a wider range of inquiry is necessary than in the general run of criminal cases. In this particular instance it is obvious that it normally would be necessary to examine many documents of the Company."

livery of Kenya documents was relevant to any inquiry being conducted by the grand jury. (Indeed, in its opposition to the Motion to Quash, the government flatly denied that the investigation concerned any "possible evasion of income tax." R. Vol. I, p. 61.) This contrasts with the affidavits and proof submitted by the government in support of substantially less burdensome subpoenas duces tecum (which were nonetheless quashed) in *Application of Certain Chinese Family Benevolent & District Associations,* 19 F.R.D. 97 (N.D. Cal. 1956). See also *In the Matter of the Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D.N.Y. 1961). Nor is there the slightest hint in the government's brief in this Court as to how every last page of the Kenya corporations' records related to the grand jury investigation. Apparently the government stands entirely on its right to demand *all* records, without any showing of relevance, need or particularity. That position flies so squarely in the face of more than a century of constitutional protections afforded by this Court's decisions that it is startling to see it suggested by the Solicitor General.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HERBERT J. MILLER, JR.
RAYMOND G. LARROCA
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1320 19th Street, N. W.
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APPENDIX

APPENDIX

APPENDIX A

STATE OF INDIANA
VANDERBURGH COUNTY } ss:

BEFORE THE U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INTERNAL REVENUE DISTRICT OF INDIANA

RE: TAX LIABILITY FOR THE CALENDAR YEARS 1957 THROUGH 1965, INCLUSIVE
OF
RAYMOND J. RYAN (A/K/A RAY RYAN) AND HELEN RYAN, 600 LOMBARD STREET, EVANSVILLE, INDIANA, OR, 218 COURT BUILDING, EVANSVILLE, INDIANA

Ray Ryan, being duly sworn upon oath, deposes and says that he is one and the same person as the Ray Ryan mentioned in the foregoing caption. That Glen Johnson, Special Agent of the U.S. Treasury Department, Internal Revenue Service, on the 18th day of November, 1966, at Evansville, Indiana, served a summons on affiant as Director of the following corporations: (1) Mount Kenya Safari Club Establishment, Liechtenstein; (2) Ryan Investments, Limited, Kenya, East Africa; (3) Mawingo Limited, Kenya, East Africa, requiring him to appear before Special Agent Glen Johnson, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the aforenamed corporations; that Attachments A, B and C required affiant to produce certain books, records and documents therein particularly set out and specified; that at the time of the service of said summons on affiant he was convalescing from an operation and was in ill health, which fact was well known to said Glen Johnson. That the books, records and documents that affiant is required by said summons to present to said Special Agent are not now, nor have they ever been in his custody or under his control and affiant has no knowledge as to whether any such books, documents or records exist, and that affiant's relation with any of the corporations

named in Attachments A, B and C of the summons was solely as that of a nominee and that he, at no time, knew the name or names of any of his principals other than the name disclosed to Special Agent Glen Johnson in confidence and by giving said Special Agent a copy of his agreement with the party therein named.

Affiant, at the time of the service of said summons, advised said Special Agent Glen Johnson that as soon as his health permitted he would make a trip to Europe and Africa in an attempt to comply with the requirements of said summons; that he has been unable to make such trip because of his ill health.

Affiant is of the opinion that he has now recovered his health sufficiently to make such trip and is contemplating going to Europe and Africa after the Christmas holidays of 1966; that he is required by the summons to appear at the Internal Revenue Office, Intelligence Division, 214 S. E. 6th Street, Evansville, Indiana, on January 3, 1967, at 10:00 A. M. That affiant is willing to make such appearance at an appropriate time, however, he will be unable to comply with the requirements of said summons and attachments on January 3, 1967.

Affiant respectfully requests of Special Agent Glen Johnson and the Intelligence Division of the Internal Revenue Service, U. S. Treasury Department, an extension of time as to the appearance date, and during said extended period of time he will make every effort to comply with the requirements of said summons and Attachments A, B and C and will, at all times, keep them advised as to his whereabouts and his progress.

Affiant, due to the distance and expense of the trip, requests an extension of three (3) months' time from the 3rd day of January, 1967, within which to do the things and matters above mentioned. Affiant further says that the threee (3) months' period of time is requested for two (2) purposes, one, and foremost, to try to comply with

the summons herein referred to, and two, for such business affairs as may relate to his contract of employment in Europe and Africa.

Further affiant saith not.

RAY RYAN
Ray Ryan

Subscribed and sworn to before me this 27th day of December, 1966.

GILBERT J. TIMBERLAKE
Notary Public

My com. expires 7-22-70.

STATE OF INDIANA
VANDERBURGH COUNTY } ss:

BEFORE THE U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
INTERNAL REVENUE DISTRICT OF INDIANA

Re: Tax Liability for the Calendar years
1957 through 1965, Inclusive
of
Raymond J. Ryan (a/k/a Ray Ryan and
Helen Ryan, 600 Lombard Street,
Evansville, Indiana, or, 218 Court
Building, Evansville, Indiana

Ray Ryan, being duly sworn upon oath, deposes and says that he is one and the same person as the Ray Ryan mentioned in the foregoing caption. That since service of summons on affiant, November 18, 1966, by Glen Johnson, Special Agent, affiant has attempted to comply therewith by doing the following things:

(a) In early January 1967, he left the United States by plane, flying first to London, England, and then to Zurich, Switzerland, where he talked to Max Zimmerman and requested the books, records and documents more particularly described in Attachments A, B and C of said summons and relating to

1. Mount Kenya Safari Club Establishment, Liechtenstein (a corporation operating in Kenya, East Africa).

2. Ryan Investments, Limited Kenya, East Africa.

3. Mawingo Limited, Kenya, East Africa.

(b) Max Zimmerman refused to permit affiant to have access to said records for United States Treasury Department examination and inspection.

(c) The books, records and documents of the corporations and firms mentioned in 1, 2 and 3 herein are not now nor have they ever been in affiant's possession, custody and/or control, except as nominee.

(d) Affiant may have been listed and named as a director of said firms, but as such never had possession, custody and/or control of said books, records and documents other than as nominee pursuant to the Zimmerman agreement.

(e) Affiant's only relation to any of said corporations was as a nominee, as set out in the agreement of December 28, 1958, with Max Zimmerman.

(f) A photo copy of the Zimmerman agreement has heretofore been furnished by affiant to Mr. Glen Johnson, Special Agent, under a restricted use basis. Affiant hereby withdraws the restricted use provisions and said Glen Johnson is authorized by affiant to use said agreement for any purposes connected herewith. Affiant further says he has never exercised the options provided for in said Zimmerman agreement.

Affiant further says he executes this affidavit to explain his inability to comply with the summons, and prays to be relieved of the provisions of the summons.

RAY RYAN
Ray Ryan

Kenya City of Nairobi Embassy of the United States of America. } ss.

Subscribed and sworn to before me this 8th day of March, 1967.

WILLIAM B. POGUE
William B. Pogue,
American Vice Consul

APPENDIX B

[Filed Mar. 29, 1968]

LAW OFFICES

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625 South Kingsley Drive
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DUnkirk 6-3800

AND

MILLER, MC CARTHY, EVANS & CASSIDY

Attorneys for Witness RAYMOND JOHN RYAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926—Mis.

In the Matter of the Production of

Records by RAYMOND JOHN RYAN, A Witness.

Affidavit of John Bateman Story in Support of Motion To Quash Subpoena Duces Tecum

AFFIDAVIT

I, John Bateman Story of Post Office Box Number 1500, Nairobi in the Republic of Kenya, make oath and say as follows:

1. *That* I am a Chartered Accountant practising in Nairobi in the Republic of Kenya.

2. *That* I am a Director of P. & M. Limited a limited liability company incorporated in Kenya. P. & M. Limited is now and has been since its appointment on the 20th May 1966 the Secretary of the following three limited liability companys namely:

Zimmerman Limited, Mawingo Limited and
Ryan Investments Limited.

3. *That* I am the Director of P. & M. Limited in charge of the above three companies and I am intimately aware of all matters pertaining to the composition of their respective Boards of Directors.

4. *That* Mr. Ray Ryan resigned from the Boards of Directors of all three Companies on the 7th day of March, 1967 and since that date the said Mr. Ray Ryan has held no official capacity in any of the said companies. Mr. Ray Ryan was replaced by Mr. M. Zimmermann.

5. *That* Mawingo Limited is the sole proprietor of the Mount Kenya Safaries Club, Nanyuki, Kenya.

6. *That* Mawingo Limited was incorporated on the 5th day of June, 1938.

7. *That* Ryan Investment Limited was incorporated on the 6th day of December, 1961.

8. *That* Zimmermann Limited was incorporated on the 16th day of November, 1961.

9. *That* the documents in the possession of and relating each of the above companies amounts to several thousands of folios.

10. That I am duly authorised by P. & M. Limited the Company Secretaries of the said three companies and each and every statement herein is based on my own personal knowledge acquired as the Director in charge of the Secretarial activities of the said P. & M. Limited in respect of the said three Companies.

Sworn at Nairobi this 22nd day of March, 1968.

Before Me:

U. S. KALSI

[Filed April 8, 1968]

LAW OFFICES
SIMON, SHERIDAN, MURPHY, THORNTON & MEDVENE
625 South Kingsley Drive
Los Angeles, California 90005
DUnkirk 6-3800
AND
MILLER, MC CARTHY, EVANS & CASSIDY
Attorneys for Witness RAYMOND JOHN RYAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926—Mis.

In the Matter of the Production of
Records by RAYMOND JOHN RYAN, A Witness.

Affidavit of John William Mills in Support of Motion To Quash Subpoena Duces Tecum

AFFIDAVIT

I, JOHN WILLIAM MILLS of Box 7099, Nairobi, Kenya, make oath and say as follows:

1. I am a British subject residing at Nairobi, in the Republic of Kenya.

2. That I am now and have been since December 1961 a Director of the following Corporations:

(a) Ryan Investments Limited,

(b) Mawingo Limited,

(c) Zimmermann Limited.

All three of the above named Corporations are limited liability Companies incorporated in Kenya.

3. That the Mount Kenya Safari Club, Nanyuki, in the Republic of Kenya is owned by Mawingo Limited and has no separate corporate existence.

4. That I am now, and have been since March 1966, Chairman and Managing Director of Ryan Investments Limited,

and Chairman of Mawingo Limited and Zimmermann Limited.

5. That Ryan Investments Limited was incorporated on the 6th day of December 1961. The Mount Kenya Safari Club began to be operated by its owner Mawingo Limited on the 20th May, 1963. Mawingo Limited was incorporated on the 5th day of June, 1938.

6. That I have examined a copy of a Subpoena from the United States District Court for the Central District of California addressed to Ray Ryan, a copy of which is now produced to me and marked "J.W.M. 1". Based on my personal knowledge and personal inspection of the records of Ryan Investments Limited, the Mount Kenya Safari Club, Mawingo Limited and Zimmermann Limited, as specified in said Subpoena, I am of the opinion that the said records would fill approximately eight four door filing cabinets and would weigh approximately 2,000 lbs.

7. That Ray Ryan resigned as a Director of Ryan Investments Limited, Mawingo Limited, Zimmermann Limited. Mr. M. Zimmermann filled the vacancy thus created and became a Director of the said three Companies. Very shortly afterwards I was appointed Chairman of the Boards of Directors of the said three Companies and since March, 1967, I as Executive Director of the said three companies have at all times since had custody and control of the books and records of the said three Companies and of the Mount Kenya Safari Club with the exception of the Statutory Books which are in the custody of P. & M. Limited, the Secretaries. Since the 7th day of March, 1967, when Mr. Ray Ryan resigned his Directorships, Mr. Ray Ryan has not had either custody or the right to determine to whom the records should be made available.

8. That I have been requested by Mr. Ryan to send the Corporate records of the above listed Companies to the District Court in Los Angeles, California, and have refused to comply with this request.

9. That in February, 1967, Mr. Ray Ryan instructed me to carry out the formalities necessary for the recordal of his resignation as a Director from all the Boards of all Companies in Kenya in which he held office. I carried out these instructions with regard to Ryan Investments Limited, Mawingo Limited, and Zimmermann Limited. Having done this I thought that I had fully complied with Mr. Ryan's instructions. I then assured him that his instructions had been carried out and that he was no longer on the Board of any extant Kenya Company. However, I have since learnt that in this I was mistaken. Mr. Ryan had previously been a Director of the 7 Up Bottling Company Limited, a Company incorporated in Kenya. In 1965 a Receiver and Manager was appointed over this Company by the Standard Bank Limited under powers conferred on the Bank by a Debenture. The Receiver sold all the assets of the 7 Up Bottling Company Limited and the Receivership was in due course terminated. I assumed that the 7 Up Bottling Company Limited had therefore ceased to exist in that it no longer had any assets. The 7 Up Bottling Company Limited has indulged in no trade of any sort since 1965 and has no assets and to all intents and purposes it has ceased to exist. However, unbeknown to me until yesterday, the Company still existed on the records of the Company Registry in Nairobi, and a search which I caused to be carried out has revealed that the last annual return filed in respect of the Company was filed on the 15th April, 1965, and shows interalia that Mr. R. J. Ryan is a Director of the Company. Thus, contrary to my express assurance to Mr. Ryan in March, 1967, and my further confirmation of this assurance on a number of occassions over the last year, I now discover that Mr. Ryan is still technically a Director of the defunct 7 Up Bottling Company Limited.

J. MILLS

Sworn at Nairobi this 28th day of March, 1968.

Before Me:

U. S. KALSI

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,343

In the Matter of the Grand Jury
Subpoena of RAYMOND J. RYAN, Appellant.

Motion and Memorandum of the United States To Delete Certain Language From Court's Opinion

On May 19, 1970, the United States Court of Appeals for the Ninth Circuit filed its decision in this matter (No. 23,343). On May 25, 1970, the Government filed its motion "For Order Temporarily Withholding Further Public Dissemination of Court's Written Opinion", and on June 3, 1970, the Court granted this motion. On June 29, 1970, the Government filed its "Petition for Re-hearing and Suggestion for Re-hearing in Banc" in this matter.

Notwithstanding the Court's decision concerning the Government's Petition for Re-hearing, the Government moves this Court to amend its written opinion in this matter by deleting from its opinion the language appearing on lines four (4) through seven (7) of page four of the Court's typewritten opinion, said language referring to representatives of the Government of Kenya. The United States Department of State has concluded that "promulgation of the Court's decision with language in the last paragraph of the Court's opinion could be detrimental to the relations of the United States with Kenya and thus to the national interest of the United States" (see annexed affidavit of C. Robert Moore, Acting Assistant Secretary of State for the Bureau of African Affairs).

The Government understands Appellant's motion not to object to a deletion based on these grounds.

Respectfully submitted,

PHILIP R. MICHAEL
Philip R. Michael, Attorney
Department of Justice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23343

In the Matter of the Grand Jury
Subpoena Duces Tecum of RAYMOND J. RYAN,
Appellant

Affidavit

C. Robert Moore, Acting Assistant Secretary of State for the Bureau of African Affairs in the United States Department of State, under oath deposes and says:

I have read the per curiam decision of the United States Court of Appeals for the Ninth Circuit in the case shown above which was filed on May 19, 1970 and the Motion for Order Temporarily Withholding Public Dissemination of Court's Written Opinion filed by Will Wilson, Assistant Attorney General, Criminal Division, United States Department of Justice, and the Appellant's response thereto filed by Herbert J. Miller, Jr. and others.

It is my opinion and the view of the Department of State on behalf of which I am authorized to speak concerning this matter, that the promulgation of the Court's decision with the language in the last paragraph of the Court's opinion could be detrimental to the relations of the United States with Kenya and thus to the national interest of the United States.

Respectfully submitted,

C. ROBERT MOORE
C. Robert Moore
Acting Assistant Secretary of
State for the Bureau of
African Affairs
United States Department of State

Subscribed in my presence and sworn before me this 8th day of July, 1970.

ERMINIA R. SCIARRINO
Notary Public
Washington, D. C.

My Commission Expires Sept. 14, 1973.

No. 70/6660

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

to whom these presents shall come, Greeting:

Certify That C. Robert Moore, whose name is subscribed to the hereunto annexed, was at the time of subscribing the same, Acting Assistant Secretary of State for the Bureau of African Affairs, United States Department of State, and that full faith and credit are due to his acts as

In testimony whereof, I, U. Alexis Johnson, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this ninth day of July, 1970.

U. ALEXIS JOHNSON
Acting Secretary of State.

By BARBARA HARTMAN
Authentication Officer,
Department of State.

[Filed July 31, 1970]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,343

In the Matter of the Grand Jury
Subpoena of RAYMOND J. RYAN, Appellant

Order

Before: JERTBERG, MERRILL, and ELY, Circuit Judges.

The Government's "Motion . . . To Delete Certain Lan guage . . . ." from the court's opinion in the subject cause is denied.

Judge Merrill would grant the motion.

Memo to Clerk Luck No. 23,343 July 29, 1970

All judges concerned having concurred in the attached Order, as indicated, you will please file.

WALTER ELY
United States Circuit Judge

OFFICE OF THE CLERK
U. S. COURT OF APPEALS

P. O. Box 547
San Francisco. California 94101

July 29, 1970

Messrs. Orrick, Dahlquist, Herrington
& Suitcliffe
405 Montgomery St.
San Francisco, Calif. 941014

Dear Sir:

The Petition for a Rehearing hereto filed in case No. 23343—In the Matter of the Grand Jury subpoena Duces Tecum of Raymond J. Ryan was this day denied.

Pursuant to Rule 41(a) and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

WM. B. LUCK,
Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23343

IN THE MATTER OF THE GRAND JURY SUBPOENA OF RAYMOND J. RYAN, Appellant

Appeal From an Order of the United States District Court for the Central District of California

Motion for Order Temporarily Withholding Further Public Dissemination of Court's Written Opinion

WILL WILSON
Assistant Attorney General
Criminal Division

EDWARD T. JOYCE
PHILIP R. MICHAEL
Attorneys,
Department of Justice
Washington, D. C.

The United States Court of Appeals for the Ninth Circuit filed its decision in this matter (No. 23343) on May 19, 1970, and government counsel first learned of this decision on May 22, 1970. The government will soon know whether it will seek further review of this decision which was rendered in favor of the Appellant, Raymond J. Ryan. Pending this determination by the government, and because of certain language contained in the Court of Appeals' de-

cision itself which language the government feels may be harmful to international relations existing between the United States and foreign countries, the government requests this Court to withhold further public dissemination of the Court's written opinion. The government makes this motion in light of its present belief that it will request the Court to delete certain language from its writttn opinion whether or not the government seeks re-hearing of this case.

The language of the Court's opinion which is referred to by this motion is found on page four of the Court of Appeals typewritten decision, filed with the Clerk of the Court on May 19, 1970, and which relates to alleged actions performed by representatives of the Government of Kenya. The government realizes the instant motion is not the appropriate vehicle to present grounds for deletion of these remarks from the official opinion which ultimately is published in the official Court reports, but the government wishes to apprize the Court of Appeals of the Order of the United States District Court which sealed the transcript as to all remarks concerning the cooperation furnished by the Government of Kenya. Since certain of these comments considered singly and out of context may be interpreted in a manner detrimental to our relations with Kenya, the government moves that the Court withhold distribution of its opinion until counsel can more fully advise the Court on these matters.

Respectfully submitted,

WILL WILSON
Assistant Attorney General
Criminal Division

EDWARD T. JOYCE

PHILIP R. MICHAEL
Philip R. Michael
Attorneys,
Department of Justice
Washington, D. C.

APPENDIX D

[3] Los Angeles, California, Monday, September 23, 1968.

. . . . . .

[5] Mr. Joyce: Your Honor, the second matter that arose was in connection with Raymond J. Ryan's appearance before the Grand Jury. As you may recall, you directed Mr. Ryan to appear before the Grand Jury and to bring with him certain records of the Mawingo, Ltd., the Ryan Investment Company, Ltd. and other Kenyan corporations. Mr. Ryan in the meantime appealed to the Ninth Circuit. Your order directed him to appear before the Grand Jury on September 11th and that order was changed by the Ninth Circuit to September 23.

He attempted to obtain a stay from the Supreme Court and was unsuccessful. He appeared before the Grand Jury this morning and upon being interrogated as to whether he complied with the order of the court he is here to answer the questions on the ground that the answers would tend to incriminate him. He did not produce any records pursuant to the order of the court. We make application now for an order to show cause why the witness Ryan should not be held in civil contempt to [6] coerce his compliance with the order of the court. We request a forthwith determination.

Under Rule 42 the witness is entitled to notice in hearing and we would request that the order to show cause set down a time for hearing two days from now, that is Wednesday, if the court's calendar is sufficiently flexible.

The Court: Mr. Miller.

Mr. Miller: If the court please, Mr. Ryan did in fact appear before the Grand Jury this morning. He had gone to Kenya and he had made formal demand for the records.

This morning I hand delivered to the United States Attorney, to Mr. Edward Joyce, a letter from Mr. Ryan outlining his attempts at compliance and submitting to the U.S. Attorney and Mr. Joyce a power of attorney

which gives them any right, power, title or interest which Mr. Ryan may have with respect to obtaining, copying, having possession, or what have you, of any of the records subpoenaed. We made this power of attorney to Ramsey Clark or to his delegate.

I may tell the court that Mr. Ryan did go to Kenya. We sent telegrams to the registrar of copyrights. We received replies, all of which I have submitted to the United States Attorney and to Mr. Joyce [7] of the Department of Justice which demonstrates so far as I am concerned his inability to comply. To make sure there was no question about it we sat down and Mr. Ryan signed before a notary public a power of attorney which transferred to—

The Court: Let's get each thing in its order, Mr. Miller. Do you want a hearing now or do you want some time on a hearing.

Mr. Miller: If the court please, as I understand the rights of the person proceeded against under civil contempt he is entitled, as Mr. Joyce said, to notice in hearing. If the court please, I received the application for order to show cause this morning. I would request a minimum of two weeks in order to prepare and if necessary obtain interrogatories from Kenya. It will take that long, if the court please, for me to obtain whatever records, whatever answers I need in the form of interrogatories from Kenya.

Mr. Joyce: If the court please, we would oppose the two weeks because there is only one question that appears before the court at this time. Did he or did he not comply. That is the only question of fact. I think the cases hold that this does not relitigate.

The Court: Inability to comply, wouldn't [8] that be a defense?

Mr. Joyce: Only if the inability to comply arose between the time of the order of the court and the present time. This is not a relitigation.

The Court: No, I understand that.

Mr. Joyce: The original facts involved in the order—

The Court: I understand that. That is what they are talking about.

Mr. Joyce: That is not my understanding.

The Court: He is not a Kenya citizen and they are preparing for a showing that he is unable to comply with the order of the court because of facts which happened after the order. I haven't heard any talk yet about relitigation of the order.

Mr. Joyce: It was my understanding that is what was to be involved: That is, that his original statement or position that he was unable to comply is the same inability that—

The Court: That is what may come out. The court may find that that is sufficient in relitigation of the order and Mr. Ryan may be in contempt but he has an opportunity to show that these were not matters which were available to him at the time of the order and that he has not been able to comply with the order because of [9] something outside of the relitigation of the order itself.

Mr. Joyce: If that is the situation—

The Court: As I take it, the order now based upon what has happened basically is a valid order of this court which is subject to compliance. I take it the only defense to that inability to comply—

Mr. Joyce: Your Honor, I agree. If that is the understanding that this is limited to the time between the order of the court then we withdraw our objections to the two weeks.

The Court: Mr. Miller may try to relitigate this matter, that is up to him. I am sure he might try to do that.

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[10] The Court: We will set it down for October 2nd, 1968 at 9:30 a.m. for hearing on the application of the Government for order of the witness to show cause why he should not be judged in civil contempt.

[11] Mr. Ryan: You are to return to this court on Wednesday, October 2, 1968 at 10:00 a.m.; do you understand that?

Witness Ryan: Yes, your Honor.

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[16] Los Angeles, California, Wednesday, October 2, 1968; 2:00 P.M.

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[23] Mr. Miller: • • •

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[24] I would suggest to the Court that the application filed by the Government in this cause is so woefully lacking in any effort to specify what the issues are in this petition, or application to show cause, as to leave me at sea—and I think any lawyer at sea—as to precisely what the issues are or will be in the proceeding.

Now, on this basis and this basis alone, it would be unfair and a denial of my client's rights to require us, without further specification, to continue forward with the proceeding. There is no [25] specification as to what has been violated here. Are we charged with violating a subpoena which has been quashed or modified by the Court's order? Are we charged with violating a Court order? Was it the Court's verbal order entered in court or was it in fact the Court's written order which was signed?

There is no specification as to that fact. There is no specification as to whether we are charged with failing to make application with the registrar of companies, whether our application was valid or invalid, whether perhaps we took steps which we shouldn't have or perhaps we took steps—or did not take steps which we should have. In other words, I am completely in the dark as to precisely what the Government is charging as to, A, what has been violated, if anything; and, secondly, what part of that which has been violated we are charged to defend.

I think basically the problem goes back to a misapprehension of Government counsel as to precisely what type of a proceeding this is.

There is no question that the cases cited by the Government tend to show that where there has been a hearing and a bankruptcy turnover order—and I'm talking about Maggio vs. Zytes, [26] that that ruling on possession is in fact one which does have validity in terms of res judicata. But I would submit to the Court, and this is really a very important point, in those cases cited by the Government—in Maggio vs. Zytes—in those cases wherein turnover orders have been at issue before the Court, those orders are, A, appealable, and, B, in the Maggio case were appealed all the way to the Supreme Court. Therefore you not only have a full-scale trial and hearing on a turnover order, but you do have an unqualified right to appeal to the Court of Appeals and from there petition to certiorari to the Supreme Court.

The Government has flatly taken the position before this Court, before the United States Court of Appeals for the Ninth Circuit and before the Supreme Court in the United States, in pleadings which they filed, that the order of this Court of July 25, 1968, is not in fact an appealable order. And I would suggest to this Court that on that basis, the attempt by the Government to equate this prior proceeding, which was in effect a motion to quash under 17, in essence an affidavit hearing with the type of full-scale trial with the full protection that a trial embodies under a turnover order, and a [27] right to appeal the turnover order to the Court of Appeals just absolutely does not apply to the facts of this case.

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[32] Mr. Michael: • • •

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[34] In all respects he failed to comply with the subpoena. He stands in contempt, and the order—

The Court: Let me ask you this, Mr. Michael:—

Mr. Michael: Yes, sir.

The Court: What is the order that is [35] the subject of the application for order to show cause re contempt? Unfortunately this file does not contain the original of the order to show cause. Do you have a copy of that?

Mr. Michael: I do, your Honor.

The Court: Well, that's the application. Where is the order?

Mr. Michael: I have the order, too, your Honor.

The Court: Let me ask you a couple of questions. What order is it of the Court that you are seeking to enforce?

Mr. Michael: It's the order of the Court, your Honor, I believe, of July 25 modified only in respect to the date by the Ninth Circuit. It was at that time that we came before the Court on a motion to quash.

The Court: All right, then is it the written order that was filed on July 25, or is it the order pronounced in court on July 25 that you are seeking to enforce?

Mr. Michael: Well, it's my understanding that the written order is just a reducing to writing of what was the oral order of the Court, but it's the order of the Court signed on July 25th.

[36] The Court: Well, which is the order you are seeking to enforce? The oral order which was pronounced in court, or was it the written order signed by the Court?

Mr. Michael: It's the written order signed by the Court.

The Court: Was that order served on Mr. Ryan?

Mr. Michael: Yes, sir. I have no—

The Court: Was it served on him? Because I have no return of personal service of the order.

Mr. Michael: I know that it has been served on him, yes, your Honor. I checked with the United States Attorney's office here to make sure that it was served.

If there was no certificate of service, that's just an administerial error.

The Court: You are going to have to show that, aren't you? If that's the order that you want enforced against him, he has to have knowledge of the order.

Mr. Michael: Well, I took steps to make sure the order was served, your Honor. Perhaps there is not a certificate of service attached to the [37] order.

The Court: Was the application for the order to show cause served on him?

Mr. Michael: Well, he stated in court today that he had the application, yes, it was.

Where is that?

Mr. Joyce: I don't know.

(Short pause.)

The Court: It was?

Mr. Michael: Yes, sir. I personally delivered that to Mr. Miller, myself.

The Court: Now, the application for the order to show cause would indicate that what he was at that time being requested by the Government to be held in contempt was for his failure to answer the subpoena duces tecum which was served on him on April 9th, 1968.

Maybe you can clear something up with me, because the order of the Court indicates that it was a Grand Jury subpoena which was served on March 5, 1968.

Mr. Michael: The subpoena was—

The Court: Requiring him to appear on April 15, 1968.

Mr. Michael: The subpoena was served [38] on March 5th, 1968, here in Los Angeles. It's that subpoena.

In one of the papers there is a typographical error. The date of April 9th is in there, which is in error. The date of the subpoena was March 5, 1968.

The Court: Well, do you think that this application and this order gives Mr. Ryan notice of what he is to meet?

Mr. Michael: Yes, sir.

The Court: In terms of what his obligations were before the Grand Jury, because, as I recall, at least the order pronounced in court and the order that was signed by the Court did not apply to all of the items of the subpoena which was served on March 5, 1968.

Mr. Michael: That's right, your Honor.

The Court: It was modified in certain respects so that they were talking about—we were only talking about and we only ordered Mr. Ryan, and he was under order at that time—there's no question about that—at the time of the oral order of the Court to produce on September 11th the documents referred to by the subpoena duces tecum which only pertained to Ryan Investment, Ltd. of Nairobi, Kenya; [39] and Mawingo, Ltd. of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club of Kenya and that's it.

Mr. Michael: That's right, your Honor.

Yes, the Court's order modifying the subpoena to eliminate the 7-Up Bottling Company which the Court noted there was no evidence in the course of the proceedings. That was clearly stated by the Court and the subpoena is clearly modified by the Court's order. It explicitly refers to only those two enterprises, it makes no mention of the—

The Court: You don't give him notice that it is the modified—or the order of the Court. Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.

Well, it isn't the demands of the subpoena duces tecum that he was under order to comply with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which were set forth therein, not to the subpoena in its entirety.

[40] Mr. Michael: Well, your Honor, our position is that the subpoena stands as the Court order modified it, and that subpoena has not been changed, it's been altered by the Court's order, and the Court's order refers to the subpoena, and it is specific.

The Court: Mr. Ryan is under specific orders of the Court—not to comply with the subpoena, but to do certain

things, and that was the order of the Court. And if it did anything, it supplanted the subpoena duces tecum because the order of the Court made orally to him, which I think there was no question about, he was asked if he understood it, as I recall—

Mr. Michael: That's right, your Honor.

The Court: —and he said he did, and the order was pronounced in his presence as to what he was to do.

Mr. Michael: That's correct.

The Court: And it would be that order that would be the subject of any contempt, not the subpoena duces tecum because the order of the Court supplanted the subpoena duces tecum; and I think he is entitled to have that spelled out. It doesn't affect any difference in what has already been accomplished on September 23rd that he didn't comply with [41] the order of the Court, but I think he's entitled to know what he has to meet and what it is that the Court ordered that he didn't do, because he did appear, for instance.

Mr. Michael: In the Grand Jury, it gives—

The Court: One part of the order was that he was to appear, and he did do that, so he's not in contempt with that part of the order. He did not produce certain documents. Well, what documents were they that he didn't produce?

Mr. Michael: He didn't produce—

The Court: He may have produced some, and he may not have produced any. There is no indication in the application of what he was to produce and what he didn't produce.

Mr. Michael: He produced nothing that he was to produce, your Honor.

The Court: Well, I understand that from what you're telling me, but I think Mr. Ryan is entitled to know what he has to meet.

Mr. Michael: Well, he was asked by the Grand Jury, it says, "Do you recall Judge Real giving you the order," and he says, "Yes—."

The Court: I understand that, and that [42] may be the evidence of contempt, that may be evidence that he understood what he was to do, but that doesn't give him notice of what he has to meet on the order to show cause re contempt.

The Government may have abandoned some area of it, it may have gone in other areas of it, and he may have some defenses on some areas of it and no defenses on other areas of it, which he is entitled to put before the Court, and I think that even though this is a summary proceeding in contempt, whether it be civil—at least I think that—contempt, whether it be civil or criminal, is a summary proceeding, but even in a summary proceeding the respondent is entitled to know what he has to meet in that summary proceeding. He is entitled to notice and a fair hearing.

Mr. Michael: I agree, your Honor.

The Court: That at least is what due process is, and I just don't think that the application and the order comply with due process in terms of what Mr. Ryan has to meet on the question of whether or not he is in contempt of the order of this Court.

Mr. Joyce: Your Honor, may I speak to that?

[43] The Court: Certainly.

Mr. Joyce: At the time of the application for the order to show cause, the application had already been prepared; but at that time when I requested that the Court order Mr. Ryan to show cause why he should not be in contempt, I pointed out that he had come before the Grand Jury pursuant to the order of the Court but he had not, in compliance with the order of the Court, produced the records. And I think at that time the Court again verbally ordered him to show cause on today as to his contempt, and where there may have been a variance between the final order as signed, it is certainly that the order of the Court, the verbal order of the Court in his presence gave him plenty of notice as to what was to be carried on today.

The Court: That may be, but I don't have that before me and I don't exactly recall and there is nothing in the file—at least it hasn't gotten there yet, these files are a little behind time—that would indicate to me what I did tell Mr. Ryan at that time.

I'll give you an opportunity to get that transcript to to see whether or not that can be sufficient hearing—or if you already have it, [44] we can check it—or sufficient notice of the question of what he has to meet on the order to show cause re contempt.

I take it there is nothing that requires the notice to be in writing.

Mr. Joyce: No, that's correct, your Honor.

The Court: Just so long as he has notice.

Mr. Joyce: Yes, and we contend that he had notice.

Mr. Miller: If the Court please, I do have a copy of the transcript and I would like to read page 10. I will deliver this to counsel for the Government.

"The Court: We will set it down for October 2nd, 1968, at 9:30 a.m. for hearing on the application of the Government for order of the witness to show cause why he should not be judged in civil contempt."

In other words, this hearing, according to the Court's statement, was to be a hearing on the application for an order to show cause, and it was converted, in effect, into a hearing on the show [45] cause order by reason of the fact that an order was signed.

Mr. Joyce: Your Honor, my statement to the Court at that time was:

"The second matter that arose was in connection with Raymond J. Ryan's appearance before the Grand Jury. As you may recall, you directed Mr. Ryan to appear before the Grand Jury and to bring with him certain records of Mawingo, Ltd. and Ryan Investment Co., Ltd. and other Kenya corporations.

"Mr. Ryan, in the meantime, appealed to the Ninth Circuit.

"Your order directed him to appear before the Grand Jury on September the 11th and that order was changed by the Ninth Circuit to September 23rd. He attempted to obtain a stay from the Supreme Court and was unsuccessful. He appears before the Grand Jury this morning, and upon being interrogated as to whether he complied with the order of the Court, he is here to answer the questions on the—as to whether he has [46] complied with the order of the Court. His answers to the questions on the grounds that the answers would tend to incriminate him. He did not produce any records pursuant to the order of the Court. We make application now for an order to show cause why the witness Ryan should not be held in civil contempt to force his compliance to the order of the Court. We request a forthwith determination under Rule 42, the witness is entitled to notice and hearing, and we would request that the order to show cause be set down at a time for hearing two days from now—that is Wednesday—if the Court's calendar is sufficiently flexible."

And there was a discussion again about the time, and the Court set the hearing down for the—I have here a copy of that transcript supplied to me by Mr. Miller and tendered to the Court if the Court so wishes.

The Court: All right. In reading the transcript, although the application in the order does [47] not set forth with any specificity the matters which Mr. Ryan was to meet on the question of the order to show cause re contempt, the record does show that Mr. Ryan was in court on September 23rd, 1968, and was given notice that the Government made application for an order to show cause as to why he should not be held in civil contempt for not complying with the orders of the Court to produce on September 23rd, as amended from September the 11th by the Court of Appeals for the Ninth Circuit, the records, papers and documents referred to in the subpoena duces tecum pertaining to the operation of Ryan Investment, Ltd. of Nairobi, Kenya, and Mawingo, Ltd. of Nanyuki

and Nairobi, Kenya, doing business as the Mount Kenya Safari Club of Kenya.

The motion to dismiss the order to show cause on that ground, from lack of notice, will be denied.

The motion to dismiss the order to show cause on the grounds that it violates the Fifth Amendment in that compliance with the order would violate the Fifth Amendment right of the defendant against self-incrimination is denied.

Since the question of the custody and control of the records, at least up until the time of [48] the hearing on September—on July 25, 1968, was determined against Mr. Ryan, the motion to dismiss on the grounds that the order does not—or the application of the Government does not allege present ability to produce the records is denied, in that that is evidentiary and not a matter of notice and is not an affirmative duty of the Government to show ability to produce; it is a defensive matter of inability to produce, as I read the cases. And upon the other grounds set forth as previously raised by the respondent on the question of the quashing of the subpoena duces tecum, the motion to dismiss the application for order to show cause will be denied on the same grounds that the motion to quash the subpoena duces tecum heretofore heard by the Court was denied.

Now, we have the next application of completion of the testimony before the hearing.

Mr. Miller: If the Court please, may I address myself to two matters?

The Court: All right.

Mr. Miller: In the application for an order to show cause, and in the order to show cause, both are directed towards a failure to comply with the subpoena duces tecum, which does not—if I [49] understand what was said, and I did not go back over it—

The Court: No, I understand that, Mr. Miller, and assuming that the documents are a nullity, I think there is sufficient notice as required by the rule and by the "due process" clause of the Constitution in the hearing

of September 23rd, 1968, to Mr. Ryan of what the Government contended was his contemptuous conduct.

The only question now, I take it, would be the aspect of the due process which has to do with a fair hearing, which is what we are about to go into.

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[59] The Court: All right, let's continue the hearing on the order to show cause to November 6th, 1968, at 9:30 a.m.

And, Mr. Ryan, you are to return on November 6, 1968, at 9:30 a.m. Do you understand that?

Raymond John Ryan: Yes, your Honor.

The Court: We will continue the matter to October 14, 1968, at 10:00 a.m., my regular law and motion calendar, for you gentlemen to advise the Court as to what procedure you are pursuing. By that time you should be able to ascertain that.

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[19] Los Angeles, California, Monday, October 7, 1968; 5:30 P.M.

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[32] **Carl Hirschman.**

called as a witness herein, being first duly sworn, was examined and testified as follows:

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[70] Cross Examination

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[72] Q. Were you subpoenaed in the United States to appear before the Grand Jury? A. Yes, I was.

Q. Who served the Grand Jury subpoena on you? A. Here in California?

Q. Yes. A. This young man here (indicating).

Mr. Miller: May we have a stipulation that he pointed to Glen Johnson, agent of the Internal Revenue Service?

Mr. Joyce: I have no objection to the identification. I fail to see the relevancy.

Mr. Miller: I am not pursuing it any further.

Q. Pursuant to that Grand Jury subpoena were you required to bring certain documents to the United States? A. Yes, I was. It was subpoenaed that I was [73] to bring along all my documentation I had in my possession and to obtain a documentation—my legal department read it wrong, I believe. They only gave me along the documentation in our possession. We did not make an effort to get the documentation from Kenya and then I was threatened with contempt of court because I did not bring this along. I think this has been rectified in the meantime because Mr. Coleman, my attorney, had worked something out with the Government attorneys to—well, I have written since then and sent telegrams to Kenya to obtain the records which meet the approval of the Government attorneys.

. . . . . .

[75] Q. In compliance with the Grand Jury subpoena did you contact Mr. Mills and seek to obtain the records? A. I did.

Q. What was his response, if any?

Mr. Joyce: Objection, your Honor, hearsay.

By Mr. Miller:

Q. Did he produce the records? A. He did not, no.

Q. Do you know where the records of Mt. Kenya Safari Club are currently located? A. No, I don't.

Q. Do you know where the records of Mawingo, Ltd. are currently located? [76] A. No, I don't.

Q. Do you know where the records of Ryan Investments, Ltd. are currently located? A. No.

Q. Did you at some time know where those records were? A. No.

Q. Do you know who has physical possession of any of those records? A. No.

Q. When was the last time you went to Kenya, Mr. Hirschman? A. Last January.

. . . . . .

[3] Los Angeles, California, Monday, October 14, 1968, 11:00 A.M.

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Mr. Larroca: I would like to put this whole thing in context, if you will bear with me. I would like to refer to some notes to get some dates actually on the record.

As Mr. Michael said, your Honor directed in the last hearing on October 2 that we report to the court precisely what had been done in the way of agreement before you as to the taking of this Kenya testimony. This whole thing started so far as the Kenya testimony was [4] concerned on the 23rd when the issue of civil contempt first arose. I believe Mr. Michael asked the court for an order which would require a responsive cross interrogatory to be served within 24 hours rather than the longer normal time under the civil rules.

On the 25th we filed those interrogatories. On the 27th of September the Government responded and had their cross interrogatories. On the 28th we air mailed them to Kenya with expediting instructions to our counsel, Mr. Deverell, in Kenya.

Now, those interrogatories, which was really a deposition on written interrogatories, were taken pursuant to 28(b)(1) which is the notice provision or the fastest way you could possibly get them. At that time we were faced with the October 2 return date on the order to show cause. We felt we had to have it by October 2.

On October 7 Mr. Deverell received the papers in Kenya, Nairobi. By cable of October 8th we were advised by Deverell that neither of the witnesses would testify voluntarily but that they would testify if they were compelled to by Kenyan court process.

Now, the very next day we checked with the State Department on Kenyan law, that was October 9. On October 10 we hand delivered a letter to the government [5] followed by phone call. We told them of the situation, told them what happened. We advised them we were going to move

the court for letters rogatory under 28(b)(3) because that is the only way you can get a Kenyan court process. We asked them to join us. If they would do so in moving the court we would have no objection to what the Government always wanted, and that is oral examination of the witnesses. If they wanted to go over them and base them on the letters rogatory orally it was all right with us.

At the same time, I believe this was on a Friday, Mr. Michael suggested we get together on Monday morning, that we get in touch with the court to delay this day to day report a few days so we could come out here with something concrete and present something concrete to the court. This was fine with us because we said we are faced with a November 6th date. If we talk for a couple of days and we can't get any place will you agree to put off the November 6th date for a few days, at least the same number of days, because things are closing in on us now. Mr. Joyce said not for one hour would he consider putting the November 6th date over and that is where the matter stopped.

This morning I gave Mr. Michael a copy of our motion, notice of motion, memorandum for letters [6] rogatory together with the written interrogatories to go with them. I would like to ask the court now, I believe under your rules that I would have an order shortening time so that I could file this motion and that Mr. Michael acknowledge proper service of them at this time.

Also at this time either give us an opportunity to argue, present argument on our motions for letters rogatory or set a very quick hearing on it so we could get under way. We canot even initiate them without an order of the court. I would like to have the opportunity to present that argument to you now, sir.

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[8] The Court: There is nothing implicit in it. It is just getting the process started. Each thing will have to take its own place so far as the procedures are con-

cerned. But the process, if it does not get started and there is to be a delay then the delay is going to be longer.

Mr. Michael: That is right, it is in the court's discretion not even to issue the letters rogatory.

The Court: I understand that, but I think they should be given an opportunity to be heard if it is at all possible.

Mr. Michael: I agree, your Honor.

The Court: They ought to be able to present any defense. You are asking for pretty substantial penalties here and I think they ought to be given an opportunity to give everything they can in terms of why they don't comply with the court orders.

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[15] Mr. Michael: Perhaps we have done more work on this because that is what our solicitor has told us in Kenya. We have made four telephone calls. You have no objection to that aspect of it, as I understand it.

Thirdly, what we are asking for is that sworn testimony be taken. I think that is in the letter as you have phrased it, I am not sure it is in that sense. What would be occurring is sworn testimony. The power to subpoena, which is the power we have utilized under the court laws of Kenya be also available to this commission.

Mr. Larroca: Power to subpoena what?

Mr. Michael: Records, subpoena individuals, subpoena records if necessary. You are bringing witnesses before a commission.

Mr. Larroca: I would be interested in knowing in the civil contempt proceeding when the issue [16] is present ability what records precisely. Are you going to substitute this for a Grand Jury proceeding?

The Court: It might be the minutes of a corporation, I don't know.

Mr. Larroca: As of what date?

Mr. Michael: Pardon me.

Mr. Larroca: I just don't know how far you are proposing to go. We want to use this process—

The Court: I take it, as much as you are entitled to show that he does not have the power they are also entitled to show that he does have the power. I don't know what the Government's position is but it would seem to me from Mr. Hirschman's testimony the other day that one of the positions of the Government is going to be, I don't know Kenyan law, but there has never been a resignation by Ryan that is effective.

Mr. Michael: Certainly, your Honor, they can show records. If they can't be removed from the government of Kenya certainly they can be producible under subpoena which is under the power of the court of Kenya. This commission which will be set up, which you are requesting be set up, certainly has its power. Our solicitor has advised us of that. It has the power not only to produce witnesses but documents.

Mr. Larroca: If the issues are relevant [17] to this case I cannot object but I would have to reserve the relevancy objection.

The Court: Certainly.

Mr. Michael: I understand.

The Court: Like any deposition.

Mr. Michael: What takes place now has nothing to do with its admissibility in a judicial hearing. The whole thing may come back nine-tenths relevant from your standpoint or ours and it would have to be decided at that time. It is such an expensive process and it is going to involve so many people and channels that it should be as exhaustive as possible to avoid the necessity of having to repeat it.

Mr. Larroca: I would like to voice one objection, that is it seems to me that you are now on the verge, if you have not already crossed that border, of turning this civil contempt proceeding into the grand jury by extending the scope. You are now asking for subpoena power for documents. Are you now going to reach for the same documents that you tried under the grand jury subpoena?

If that is the case I would have some reservations because the issue of relevance—

The Court: That might end the whole problem if they can get those documents in that fashion. That will end the whole problem, won't it? It is legally [18] possible for them to get the documents that they want and then they won't need Mr. Ryan any further and that might just end it all.

Mr. Larroca: It might end it all if they can do this legally.

The Court: So there is no objection in that respect.

Mr. Larroca: No, I have reservations about using this particular process to implement the Grand Jury but if you want the records that way and you can get them under Kenya law—

The Court: It might end it all.

Mr. Michael: That is all we have been after for the last year.

Mr. Larroca: You could have gotten these letters rogatory in yourself.

The Court: In any event there is no problem in doing that if Kenya law provides for the subpoena power by the commissioner. I guess it can be done.

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[28] Mr. Larroca: May I be heard on this? If we can refer back a minute to the findings in the July 25 order. That order, of course, makes a finding, a very specific finding, that isn't specific. It says that at times the only finding that has been made is that at times subsequent to the beginning of a grand jury investigation Ryan has had custody and control. By deposition of Mr. Johnson, IRS agent, we understand that [29] that investigation goes back to 1963. We don't know exactly when it is that the finding of the court was as to possession and control. I'm trying to make a proffer for the evidence which I haven't heard yet. Our position is that first of all Ryan does not have the present ability today to comply with this order

and parenthetically I would add that is the only issue in a civil contempt proceeding.

The Court: No, but the question is when does he say he lost it.

Mr. Michael: We say he does have the ability.

The Court: Because if he lost it after July by his own act then he is in contempt of this court.

Mr. Larroca: Speaking academically, if I may, your Honor, on this one, we would be in contempt but he could not be in civil contempt. Civil contempt is only coercive in power and cannot be used to punish him for any act. So that if he is unable to do the act no matter what happened he cannot be punished for civil contempt. There may be other proceedings and other considerations but not under civil contempt.

The Court: The question is not whether he did realistically. The testimony of Mr. Hirschman, I don't want to prejudge, but the testimony of Mr. Hirschman [30] is that he has had no notice of the meeting of the board of directors, no notice of any withdrawal of Mr. Ryan. He has had no notice of any activity of Mr. Ryan in connectiom with these companies at least for the last two years.

Mr. Larroca: We would expect the testimony—

The Court: And he says he is still a director. If he is still a director I take it, I don't know what Kenya law is, but here there would be no effective meeting. The officers who were officers and directors in 1960 would still be officers amd directors. They may have submitted their resignations but resignation has to be accepted.

Mr. Larroca: We would expect that the testimony would encompass proof that at no time since Raymond Ryan had been umder the subpoena of March 5, 1968, that he had custody, possession and control; that he was shareholder, director or officer.

Mr. Michael: I submit we have litigated the period from March to July 25.

Mr. Laroca: I take very strong exception to that because where can you show me any finding that he did? There hasn't been any.

Mr. Michael: Read the record. I remember specifically Judge Real posing the question. He said, [31] "I don't care what happened before." This is either to me or Mr. Joyce, I think Mr. Joyce. "I want to know what the status is now," and that is what was decided, July 25.

Mr. Larroca: Your Honor, there has only been one adjudication in this case. May I point out to you Honor this: That adjudication on possession or control was made on July 25. It referred to some time in the past. Not only that but that order itself is not even final because as the Government has contended both to the Ninth Circuit and the Supreme Court it is not a final order. I don't see how it could be res judicata on the subject.

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[4] Los Angeles, California, Thursday, December 12, 1968, 4:45 P.M.

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[7] Mr. Murphy: Your Honor, the change in circumstances to which I refer is the fact that on December 10th, I believe it was, the Grand Jury which had commenced the investigation giving rise to this civil contempt proceeding returned an indictment against Mr. Ryan, which indictment concerned a conspiracy allegedly commencing August of 1966 and continuing to the date of the indictment, which dates would include the period of the alleged civil contempt.

If your Honor please, might inquiry be made of Mr. Michael as to whether or not this Grand Jury [8] continues in existence after returning the indictment, and whether or not they are continuing to work on Mr. Ryan or continuing an investigation concerning Mr. Ryan. I think that this would be an appropriate question to find out. Maybe these proceedings are moot.

The Court: Well, Mr. Murphy, so we have the record clear, on December 11, 1968, the application of—or I should say on December 10, 1968, the court entered an order expanding the proceedings to include criminal contempt. So in any event should the Grand Jury cease, the criminal contempt would still be pending before this court.

Mr. Murphy: If the court please, I am here at somewhat of a disadvantage in that we are here because the Government asked us to be here and because Mr. Ryan and his counsel sought to convenience Mr. Holden. We have not had an opportunity to thoroughly brief and argue, your Honor, and prepare for argument the question as to whether or not the application—or whether or not the court might consider vacating its order to enlarge the proceedings to criminal contempt, and we feel that we would hesitate to make such an argument at this time. I think that Mr.—and in fact I can represent to the court that without knowledge that the court had already ruled on the matter. Mr. [9] Larroca and Mr. Miller sought to get their authority and their arguments together so that they could succinctly present this point to the court, whether or not the criminal contempt in the circumstances of this case can be now applied or should be now applied and I am sure that they did it with full respect for the court and not knowing of the order, your Honor, I am sure captioned their motion in such a way to request the court to vacate its order rather than to change its order, but there are other factors, your Honor, that we respectfully submit come into play, notwithstanding the fact that an application has been made now to change these proceedings from civil to criminal and by virtue of the court's order such an application has been granted.

We have a subtle change perhaps arising out of the very—or arising out of the indictment. You see, as of the date of the indictment, Mr. Ryan became a defendant in a criminal prosecution. As of that date his appearance

before a federal grand jury without counsel would give rise to some very grave constitutional grounds, especially when that Grand Jury was investigating by virtue of the complaint itself or by virtue of the indictment, especially when the Grand Jury was investigating an offense for which they had returned an indictment. I am not sure that I am [10] making myself very clear, your Honor. It's a difficult point that I would respectfully submit that if Mr. Ryan's ownership or officer status with Ryan Investment Company or Mawingo Limited were in question, and is questioned by the indictment, an appearance by Mr. Ryan before a federal grand jury would, we respectfully submit, violate his Sixth Amendment right to counsel. He is certainly within a very sharp focus once the indictment has been returned.

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[12] The Court: Yes, Mr. Murphy, but we are not retrying the question of the order and the basis upon which the order was made. The question now is, is there an order, did he violate it knowingly, and if he did, he is in contempt in this court, and that is all. We are not going to relitigate on the question of [13] a contempt. Mr. Miller may try to do that, but he is not going to relitigate the question of whether or not there should have been an order in the first place.

Mr. Murphy: No, your Honor, but with reference to it, the Government will still have to prove beyond a reasonable doubt that a status existed. Is that correct? In other words, they cannot rely upon the order other than for the face of the order as to what it says. Is that correct, your Honor?

The Court: Well, they have to rely that the fellow that they brought in on the order to show cause is Raymond J. Ryan, the same one that was ordered. That doesn't mean they have to now relitigate the question of whether or not he was an officer in Mawingo or any of those other corporations. That has been litigated, whether or not

he had the capacity to get the records prior to the date upon which he was ordered.

Mr. Murphy: But that's the precise point that I am respectfully trying to make, your Honor, that when that was litigated, that was litigated at a civil standard.

The Court: It doesn't make any difference, Mr. Murphy. Are you trying to tell me that if the court makes a civil injunction and there are criminal contempt proceedings that are brought as a result of the [14] failure to abide by the injunction, that you relitigate the question of his status in terms of the civil injunction? The answer to that clearly is no.

Mr. Murphy: Your Honor, but it would look to his capacity to perform the acts and—

The Court: The performance of his capacity is only after the order.

Mr. Murphy: Yes, your Honor, and it—

The Court: Otherwise it was impossible for him to do it upon events after the date of the order.

Mr. Murphy: Yes, your Honor. Now in his capacity after the date of the order would, we very respectfully submit, be very much in issue and would be necessary to prove beyond a reasonable doubt—

The Court: It's the duty of the Government to prove that capacity, I take it, as part of the order.

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[20] Mr. Michael: * * *

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[21] The other points raised, prior to taking the testimony of Mr. Holden, I might respond to briefly. The civil contempt and the criminal contempt are still on the calendar. The Grand Jury does expire on December 22nd, at midnight of the 21st, at which time, of course, the civil contempt would become moot.

I do not anticipate, however, using this Grand Jury between now and that date. Of course, the criminal con-

tempt is different from the civil contempt, in that it was completed, in our opinion, at the time the respondent failed to produce the records, as directed by this court, before the Grand Jury, whereas the civil contempt deals with completely different matters, the matter of coercion to order the witness to produce the—to compel the witness to produce the documents and until he does so, to be held to some fine or incarceration.

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[22] Mr. Murphy: Counsel for the Government indicated that the Grand Jury in this matter is not anticipated to return into session, thereby rendering moot a civil contempt proceedings. After all, the civil contempt could be coercive in nature and only have any vitality if the Grand Jury were going to be in session, and if it has no legitimate business and if it is not going to be in session, we would respectfully submit that counsel for the Government on his own motion dismiss the civil contempt.

Mr. Michael: No, the Grand Jury is certainly available any time between now and Saturday, the 21st of December, to have Mr. Ryan appear before it and receive the documents that he has been ordered to produce. The Grand Jury does not contemplate a calling of any new business at this time. It certainly stands on the business already conducted, but no [23]further matters, new matters will be called on the Government's behalf before this Grand Jury, but if Mr. Ryan intends today, tomorrow or any other day before it goes out of session to produce these records, we will do everything in our power to immediately convene the Grand Jury and receive that testimony and those documents.

Mr. Murphy: We respectfully request your Honor's attention to the fact that counsel does not indicate that the Grand Jury intends to accomplish any business at all, that it would appear that they completed their business with the return of the indictment and that further use

of the Grand Jury under the circumstances would be certainly contrary to the established policies of the Department of Justice, looking back historically for grand juries to prepare for criminal trial as opposed to the use of grand juries for the purpose of returning indictments.

The Court: What is your motion, Mr. Murphy?

Mr. Murphy: I move to dismiss the civil contempt proceedings.

The Court: That motion will be denied.

Mr. Murphy: Thank you, your Honor.

[24] The Court: Before proceeding, just a moment.

Mr. Ryan, I do want to advise you that there has been an application by the Government to amend the order to show cause, from an order to show cause why you should not be held in civil contempt to an order to show cause why you should not be held in criminal contempt, and it is charged in the order to show cause and requested that you should be held in criminal contempt and punished for your disobedience of the court's order of July 25, 1968, directing that you, Raymond J. Ryan, comply with the Grand Jury's subpoena duces tecum.

It is charged also that Raymond J. Ryan appeared before the Federal Grand Jury on September 23, 1968, in Los Angeles, California, and failed to comply with the court's order of July 25, 1968, in that you declined to produce the documents validly sought by the subpoena duces tecum ordered by the court to be complied with on July 25, 1968, that your contumacious conduct occurring and following determination by the court that you, Raymond J. Ryan, had custody and control of the subpoenaed records and that pursuant to the requested amendment of the court's order to show cause of September 24, 1968, heretofore served on you and heretofore [25] announced to you in open court, all the proceedings conducted and pleadings filed and records relating to the order to show cause of September 24, 1968, to be incorporated into this criminal contempt application and applicable to this order

to show cause why you, Raymond J. Ryan, should not be held in criminal contempt.

Now, in connection with that you are ordered to appear before this court on December 16, 1968, at 3:00 p.m. and show cause as to why you should not be held in criminal contempt for refusing to comply with the order of the United States District Court directing the production of documents before the Grand Jury.

I do want to advise you also in that proceeding that you do have a right to have counsel represent you at all stages of the proceedings and to confront the witnesses who may be brought against you in that proceeding.

Do you understand that, Mr. Ryan?

Mr. Ryan: Yes, your Honor.

Mr. Murphy: If the court please.

The Court: And I might say just by way of passing that your motion was denied because presently there is no civil contempt pending before this court. There is now a criminal contempt pending, if [26] you will read the order.

Mr. Murphy: Your Honor, we haven't received a signed copy of the order. We have received a proposed order, but we just haven't received the signed order.

The Court: Show that to counsel.

Mr. Murphy: May I approach the clerk for the purpose of returning the order?

The Court: All right.

Mr. Murphy: Your Honor, I just haven't been able to find the operative language in the order indicating that the civil contempt is no longer involved. I am sorry, your Honor.

The Court: Let me see the document.

The application, Mr. Murphy, is to amend and supplement the order to show cause why he should not be held in civil contempt to compel his compliance with the sub poena duces tecum to include an order to show cause why he should not be held in criminal contempt and punished for disobedience of the order.

Now, the amendment by the order says that Raymond J. Ryan shall show cause at 3:00 p.m. on December 16, 1968, why he should not be held in criminal contempt for refusing to comply with the order [27] of the United States District Court directing the production of documents before the Grand Jury. That is really the only thing before the court.

The other order was amended by that order.

Mr. Murphy: So that the civil contempt no longer exists?

The Court: That is my interpretation of it.

Mr. Murphy: Thank you, your Honor.

Pursuant to Rule 42 and, your Honor, this was the first notice that we had that the court had signed an order in this matter, and pursuant to Rule 42 we would respectfully request additional time in which to prepare for the defense of the criminal case now as opposed to the civil proceedings.

I believe that the rule entitles us to reasonable time. I know that that is a question of fact and one which would be very difficult for me to—

The Court: Under the circumstances of the proceedings as they have now progressed, the court finds that the 16th of December of 1968 at 3:00 p.m. would be a reasonable time within which to prepare for the criminal contempt. Preparation for the testimony [28] and outstanding Letters Rogatory have been going on since sometime in October of 1968.

Mr. Murphy: Yes, your Honor.

The Court: The nature of the proceeding is not that much different.

Mr. Murphy: Yes, your Honor, but for the purpose of the record might the court note that it is after 5:00 o'clock p.m. on Thursday, December 12, 1968, the time that we received first notice of the court's order.

Mr. Michael: The record should also note, your Honor, that the Government first moved to amend the order to

criminal contempt Monday, December 9, and it was with that knowledge that counsel for Mr. Ryan agreed to the proceedings to be conducted today.

Mr. Murphy: I am sorry, Mr. Michael.

With the court's permission, might I inquire of counsel what he just said?

The Court: You want to read the statement of Mr. Michael?

(Record read.)

Mr. Murphy: Well, of course, we are not going to argue on that, your Honor. We take issue with the statement as submitted.

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[35] **William Franklin Holden.**

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the witness stand?

For the record, will you please state your name?

The Witness: William Franklin Holden.

The Clerk: Thank you.

Direct Examination

By Mr. Michael:

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[69] Q. To your knowledge, sir, where are the records located that pertain to the operation of the Mount Kenya Safari Club? A. To my knowledge they are with Mr. Jack Mills in the office in Nairobi.

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[72] Q. Did you appear before the Grand Jury on the first occasion pursuant to a subpoena? A. I appeared. It was my understanding that a subpoena would be serviced, that I would be serviced with a subpoena and I, in

lieu of being serviced, I agreed to appear, and it may be correct or not correct, but I am sure that I wasn't subpoenaed. I appeared as a voluntary witness.

[73] Q. Were you at any time made aware by any agents, officers of the Federal Government that they desired to have you, a director of the Mawingo Limited, bring any records of that corporation to the Federal Grand Jury? A. Yes, they asked that I produce—in the first interview I was asked to produce any records that I had or books pertaining to the Mount Kenya Safari Club or Mawingo Limited.

Q. Was your interview in the presence of Mr. Deane Johnson? A. That is correct.

Q. And at that point in time, did you tell the agents and officers of the Federal Government that you would attempt to secure the records? A. Yes. I stated that I had no records, and I have no files of records, nor did I have any in my possession, and that I would attempt to cooperate with them and get the records.

Q. Did you in fact attempt to cooperate with the Federal agents and secure the records of Mawingo Limited? A. Yes.

Q. And then you describe what you did in your attempt to cooperate. [74] A. On a trip following that interview I met with Mr. Jack Mills, the general manager of Ryan Investments, in Nairobi. I asked him for the records and if they were available. I said that I had been asked or requested to produce the records, and he informed me that books on Kenya corporations were not allowed out of the country of Kenya.

Q. He denied you access to those records, sir? A. That is correct.

Q. And as a shareholder and a director, did you request of Mr. Mills that he give you the records? A. Well, I am sure Mr. Mills knows I am a shareholder and a director. Yes, I asked him for them and I was denied the books.

* * * * * * * * * *

[76] Q. Was it your understanding that Mr. Mills—withdraw that question?

Did you make any other efforts to secure any records from Mr. Mills or Mawingo Limited for the purpose of bringing them to the United States District Court or to the Grand Jury with reference to the pending matter involving Mr. Ryan? A. Yes, I did.

Q. Would you tell us when these additional efforts were made?

Mr. Michael: I object, your Honor. I don't see the relevancy to allow this line of questioning. It has been pursued for a period of ten minutes, but I don't see any purpose of what Mr. Holden may have done with relation to the criminal contempt of Mr. Ryan, and on those grounds I would object to the question.

The Court: What is the relevancy, Mr. Murphy?

[77] Mr. Murphy: If the court please, it has been established by Mr. Michael in his questioning that Mr. Holden is a director, a shareholder and an officer. We are inquiring, one, what is his status as an officer? Mr. Holden has explained that officers within that organization, the offices were honorary and not working. The second point that I think we have established here is that the director of the corporation was not the principal executive officer.

The Court: What do his efforts have to do with this case?

Mr. Murphy: Your Honor, this witness has received a subpoena substantially similar to the one Mr. Ryan received.

The Court: So what?

Mr. Murphy: If the court please, if we are here to determine whether or not Mr. Ryan had power to comply, certainly we have to determine whether or not Mr. Holden, as a shareholder or as a director, had the power to comply with the subpoena, because if they were out of his reach as a director, shareholder or president of the corporation, certainly there would be an evidentiary and logical link to Mr. Ryan.

The Court: It doesn't follow at all, Mr. Murphy.

[78] Mr. Michael: I object, your Honor, on the ground it is a relitigation of issues already decided.

The Court: The objection will be sustained.

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[80] By Mr. Murphy:

Q. Mr. Holden, pursuant to the subpoena which has been served upon you, did you bring any records to court? A. No.

Mr. Michael: Objection, your Honor, on the same ground.

The Court: The objection is overruled to that question.

The Witness: No, I didn't.

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[83] By Mr. Murphy:

Q. Did you see Mr. Ryan in Kenya during the period of September of 1968? A. Yes, I did.

Q. Will you tell the court the purpose of Mr. Ryan's visit to you?

Mr. Michael: I object, your Honor, as not within the knowledge of the witness and not relevant to the hearing.

The Court: The objection is sustained.

By Mr. Murphy:

Q. Can you tell us the purpose as to your [84] understanding of Mr. Ryan's visit to you?

Mr. Michael: Object, your Honor, on the ground of relevancy.

The Court: Objection sustained.

Mr. Murphy: I can offer proof, your Honor, that Mr. Ryan called upon Mr. Holden to elicit efforts to secure records in order to comply with a subpoena that was served upon him. We submit that that in and of itself is highly relevant in this type of case with the issues involved here. Mr. Ryan was required by order of this court to make efforts to secure documents, and I think it is highly relevant as to whether he did make efforts, and this witness

has the opportunity of telling us whether or not he did and—

The Court: What has Mr. Holden's understanding got to do with it?

Mr. Murphy: Well, your Honor, if Mr. Holden—

Q. Did Mr. Ryan ask you to get any records, Mr. Holden?

Mr. Michael: Object, your Honor, on the ground of relevancy. I would state that counsel misstates the purpose of this hearing. It is a question as of July what the status was, not what Mr. Ryan [85] did afterwards to get someone else to produce the records for them.

The Court: You might go into the mitigation of the contempt, and for that purpose, and that limited purpose, the objection is overruled.

The Witness: Would you repeat that?

(Record read.)

Mr. Michael: I object on the additional grounds, your Honor, as hearsay as to what Mr. Ryan may have said.

The Court: The objection is overruled.

The Witness: Yes.

By Mr. Murphy:

Q. What did Mr. Ryan request you to do, sir? A. He asked me to get all of the books that I could possibly get referring to the Mount Kenya Safari Club and Mawingo Limited from Mr. Jack Mills.

Q. And did you make any effort to comply with Mr. Ryan's request?

Mr. Michael: I will object, your Honor, on the grounds of relevancy.

The Court: That objection is sustained. This man is under no duty to do what Mr. [86] Ryan asks or tells him to do.

By Mr. Murphy:

Q. Did you at any time subsequent to Mr. Ryan's request of you to secure the documents report back to Mr. Ryan as

to whether or not you were successful in getting the records?

Mr. Michael: Objection on the grounds of relevancy as to what this witness may or may not have done.

The Court: Objection sustained.

By Mr. Murphy:

Q. Do you know if Mr. Ryan attempted to secure any records or documents from Mawingo Limited, Mr. Holden? A. It is my understanding that he tried.

Mr. Michael: I object. It is not responsive.

The Court: No. He asked if he knew.

Do you know, Mr. Holden? Do you know?

The Witness: I can't say positively, no.

By Mr. Murphy:

Q. Of your knowledge, sir, what did Mr. Ryan do in September of 1968 in order to secure records [87] or books of Mawingo Limited?

Mr. Michael: Objection on the same grounds. The witness has stated he has no knowledge.

The Court: Objection sustained.

Mr. Murphy: If the court please, the question is asked of the witness' knowledge. Counsel objects on the ground that the witness has no knowledge. The question seeks—

The Court: He answered the question before that that he has no knowledge.

Mr. Murphy: Your Honor, may the answer of the witness be read back?

The Court: Yes.

Would you read the previous question and the entire answer of Mr. Holden?

(Record read.)

The Court: That is the answer.

Mr. Murphy: If the court please, the witness said he can't say positively. I asked him with reference to his

knowledge. There might be gradations with reference to being positive or not, and this is cross examination.

The Court: Mr. Holden, what did you see Mr. Ryan do with respect to securing these records, [88] not what somebody told you, but you saw?

The Witness: Mr. Ryan came to me and informed me that he was unable to get the records and asked me to get the records. This was in Northern Kenya, your Honor. Mr. Ryan chartered an aircraft—

The Court: Not what Mr. Ryan or anybody else told you, but what did you see Mr. Ryan do with reference to getting the records?

The Witness: I did not see anything, your Honor.

By Mr. Murphy:

Q. Did Mr. Ryan appear before you in a chartered aircraft in Kenya in September of 1968? A. Yes.

Mr. Michael: Object on the ground of relevancy.

The Court: The objection is sustained.

By Mr. Murphy:

Q. Following your visit with Mr. Ryan in Lake Rudolf in Kenya in September 1968, did you go with Mr. Ryan by aircraft to see Mr. Mills?

Mr. Michael: Objection, your Honor, on the ground of relevancy.

[89] The Court: The objection is overruled.

The Witness: No.

By Mr. Murphy:

Q. How did you transport yourself to see Mr. Mills—

Mr. Michael: There has been no testimony to that effect. I think he is misstating the record, your Honor.

Mr. Murphy: If counsel would let me finish the question, I added "if at all" to the end of the question. Perhaps if he would listen to the end of the question prior to the beginning of the objection, we might not have a problem.

The Court: The question is did you go to see Mr. Mills by aircraft?

Mr. Murphy: If at all.

The Witness: No.

By Mr. Murphy:

Q. Did you go to see Mr. Mills by any means of transportation or contact Mr. Mills following Mr. Ryan's visit with you at Lake Rudolf—

Mr. Michael: I object, your Honor.

By Mr. Murphy:

Q. —in September of 1968?

[90] Mr. Michael: Object, your Honor, on the ground what Mr. Holden may have done in connection with Mr. Mills is not relevant to the hearing.

The Court: The objection is sustained.

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[3] Los Angeles, California, Monday, January 27, 1969, 2:30 P.M.

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[5] Mr. Miller: If the Government is proceeding on two bases and two fronts, as it would be proper to proceed with one criminal trial, that would be one thing, but they insist on both, and I don't see that they have any choice but to accommodate us and to protect Ryan's rights. They have as much at stake in this as we do.

The Court: Perhaps both cases should be tried together, as long as the government has no objection to a jury trial on the content, shouldn't they?

[6] Mr. Joyce: Consolidation? That would solve a lot of problems, your Honor, if the two of them are consolidated and tried together.

Mr. Miller: Certainly a consolidation would remove a very objectionable part of the proceeding, because every case that has dealt with this matter, if the court please,

has said that where you put the trial—put the defendant to the test in two different proceedings—

The Court: Who has the other case?

Mr. Miller: Judge Curtis.

Mr. Joyce: Judge Curtis.

Mr. Miller: I mean the mere fact that I have to make this motion demonstrates why the two proceedings would prejudice him. If we—even when I was before Judge Curtis I had to explain just a tiny bit about this case. It's been picked up in the papers, and everybody is going to have their minds made up, and that's why this very motion demonstrates a problem.

Mr. Joyce: Without admitting that there is any overlapping of the two cases, we wouldn't object to a consolidation, but I do object to Mr. Miller continuously saying these are overlapping. These are two separate and distinct and deliberate destructions of records back in 1956 and—

The Court: He states his position. You are [7] restating it.

Let me take a recess and I will talk to Judge Curtis and see if we can resolve this between ourselves. That might be a problem.

(Recess taken.)

The Clerk: Miscellaneous 1926 in the Matter of Raymond J. Ryan; further proceedings.

The Court: All right. In that matter, Mr. Joyce and Mr. Miller, I have talked to Judge Curtis on the matter. He also agrees that the matter—that both matters, the matter here presently before this court and the matter which is presently before his court, should be consolidated. I lost the toss of the coin. So I will take both of the matters.

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[8] Los Angeles, California, Tuesday, June 10, 1969, 1:30 P.M.

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[46] Mr. Michael: May it please the court, addressing myself to the Government's application for amended order to show cause which was filed approximately the 12th day of February, 1969, Miscellaneous 1926.

This motion, your Honor, of the Government was merely a recapitulation of the order to show cause which was directed to Mr. Ryan originally on September 23, 1968, following an appearance by him before the Federal Grand Jury in Los Angeles. There is nothing in this new motion to show cause.

Following the motion to show cause the defendant requested and was granted a jury trial. In order to have his pre-sentence or charge to be read to the jury the Government framed this particular application for an amended order to show cause. It does not amend the order to show cause in any substantive way whatsoever. It merely makes clear what it is that Mr. Ryan must show cause about, purely a fact of refusal to produce certain records before the Federal Grand Jury following an order by this court that he produce those records.

The order to show cause is specific, follows the dictates of federal rules 42 indicating what aspect of [47] the court order Mr. Ryan is being asked to show cause why he did not obey. It is that aspect of the order which required him to produce the books and records of the Mount Kenya Safari Club and of Ryan Investment which he was able to bring from Kenya. It did not deal with that order as to making certain records available for copying in Kenya. It did not deal with those records which would bring about a violation of Kenya law but merely the records, as the court stated, the books, records, papers and documents of Ryan Investment and Mount Kenya Safari Club not including the books of account, the minute books and the list of members, which as we know under Kenya law requires certain steps to be taken before they can be removed from that country.

The Government would submit that this order is entirely appropriate. It changes nothing which has occurred thus far in these proceedings. It is a matter of which Mr. Ryan has had ample notice orally and in writing by your Honor and by papers filed by the Government. And it would change nothing nor affect any of the motions heretofore filed in this case or which are now pending before this court.

Mr. Miller: If the court please, Herbert Miller for the defendant Ryan.

I will withdraw our opposition to the motion [48] to file the amended order to show cause.

If the court please, I am concerned about some of the language of the order to show cause but I feel that I can deal with that by filing a motion for bill of particulars.

Specifically, I am still very concerned because nowhere has the Government specified its request from defendants of long standing, specified which order in fact the Government claimed the defendant did violate, whether it is oral or the written order. But if the court please, I believe we can do that by filing a motion for bill of particulars.

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[3] Los Angeles, California, Monday, June 30, 1969, 10:00 A.M.

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[7] Mr. Miller: Addressing myself, if the court please, to the court's order of July 25 and the subsequent order to show cause which was signed by this court on June 10 of 1969.

[8] In the first place the order to show cause is based on an improper and unlawful order, namely, the order of July 25. In order for that July 25, 1968 order to have any legal binding effect it would have to be supported by proper findings. The only finding in that order, which

was a piece of paper presented to the court by the Government, declared that Ryan at times before and after the commencement of the investigation by the Treasury Department and the Department of Justice has had control of the records, papers, and documents referred to in the subpoena.

The record in this case demonstrates two things: One, the Department of Justice commenced to investigate Raymond Ryan in 1961 by their own statement; two, in 1964 the Internal Revenue Service commenced to investigate Ray Ryan and proceeded to interrogate people concerning his activities all over the United States. They have vested no finding in that order that Ryan had custody and control of the records in question on July 25, 1968, which was the date the order was entered.

Now. the Supreme Court of the United States has traced the history of the requirement that there be some type of a finding or reason supporting the issuance of the order of the type that the court entered here. It started out in Section 19 of the Clayton Act years ago. And the concept was that the court should not use its power, [9] should not use its judicial power unless it expressed the basis therefor.

Section 19 of the Clayton Act subsequently was amended and was replaced by Rule 65 of the Federal Rules of Civil Procedure. But the concept is the same whether we are talking about the Clayton Act, whether we are talking about the Federal Rules of Civil Procedure or whether in fact we are talking about the concept of due process and fairness.

The Supreme Court in the International Longshoremen's case, which was decided in 1967 and which has been cited at length in the pleadings filed with your Honor, points out that where the court uses its powers in order to compel or to enjoin conduct that that judicial power must be bottomed and premised on a proper order.

And as the Supreme Court said in 1967 in that case, if the order is invalid then the entire proceeding falls.

In that particular case the court flatly held that since there was no adequate finding, no adequate statement of reasons as to why the order issued, that therefore the basic order was invalid and the subsequent contempt citations whereby the defendants were held guilty of civil contempt, sentenced to pay a fine, fell because of the invalidity of the original order.

[10] Now, that case clearly demonstrates that the July 25 order is invalid and that order being invalid it follows inexorably that the June 10, 1969 order to show cause must fall with it.

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[24] The Court: Your position is an oral order to produce documents is not sufficient.

Mr. Miller: I do not know to this day, if [25] the court please. I do not know to this day whether the Government is charging Ryan with a violation of the written order or a violation of the oral order. I have heard statements in this court which end up being completely unclear to my own mind. The order to show cause itself does not demonstrate with any clarity, in fact, it is very ambiguous on this very point, what order is Ryan supposed to have violated. We are now on our third—

The Court: Well, Mr. Miller, if your position is that there was no written order, if your position is that there is no written order because of the rules then the only thing that is outstanding is an oral order, isn't it?

Mr. Miller: Yes, sir.

The Court: There is no question about that, is there?

Mr. Miller: If I may address the court to the validity of an oral order under the circumstances of this case.

If the court will proceed on two bases it will be demonstrated clearly that there cannot be an oral order with respect to the type of conduct required of the defendant in this case. Truly and surely the court can issue oral orders with respect to conduct in the courtroom, the setting of dates for trials and that type of [26] thing. There is no question about that. But in the cases we cited

to the court state flat out that in view of the recent amendment to the Federal Rules of Civil Procedure there is no longer any such thing as an oral judgment or order of the type here. I don't have the citation in front of me but it has been filed in one of our earlier pleadings and I will attempt to obtain that and submit it to the court. It is a flat statement out of Barron and Holtzoff to that effect, that is one thing.

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Mr. Larroca:

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[39] Following the turnover to the IRS agents Ryan was excused from appearing at the Grand Jury. Special Agent Johnson has admitted that he has consulted with Justice Department attorneys who are handling the Grand Jury investigation by the Grand Jury which issued the subpoena which forced production by July 25. And more, he has continued to cooperate and coordinate with Department attorneys. He has been in Kenya several months participating in the court proceedings, if I might add, in violation of this court's order.

Now, he in deposition claimed to have documents that indicated Ryan was an officer or director of the companies as of October '68. In that same deposition he refused to identify these documents. He refused to answer any questions about his activities in that deposition. And the Government has admitted to this court very early in these proceedings that the scope of the Grand Jury investigation was the ownership of the Mount Kenya Safari Club. Now, with that background I would like [40] to address myself to the specific requests for a bill of particulars.

One of them has nothing to do with this, the first one. We would still like to know what order Ryan is alleged to have disobeyed.

We want to know because we have to structure our defense whether we are going to be defending against the

oral order or against a written order. It makes a difference because the Government has put us in this position, it is like telling us you have been indicted for violation of a certain section of the U. S. Code and it has an A and B but we are not going to tell you whether it is A or B. We will tell you later.

We have been asking since October 2 whether we violated the written order or the oral order and we cannot get an answer. That was the first bill of particulars.

The Court: Do you think they are any different?

Mr. Larroca: Yes, sir.

The Court: How are they different?

Mr. Larroca: They would be different in legal effect.

The Court: No, not legal effect. How are they different in their content?

[41] Mr. Larroca: One has a reference to a subpoena, the other one doesn't. If it has a reference to a subpoena in the written one it would be violative of Rule 65. You can't have a reference—

The Court: That's the legal effect. What effect do they have, they both order him to produce certain records at a certain time and certain place before the Grand Jury?

Mr. Larroca: Yes, sir.

Tht Court: In that respect they are no different, are they?

Mr. Larroca: No, they are not, sir.

The Court: The other question is a question of legal efficacy only.

Mr. Larroca: I can't agree to the first one.

The Court: Well, how are they different? What records are different in each order?

Mr. Larroca: One order refers to the subpoena, the other one does not. But the legal effect is why we need the answer.

The Court: But what records are different because of the reference to the subpoena or the direct reference to the records? What records are different in each order?

Mr. Larroca: Well, are we now saying that [42] the order to show cause is limited only to a refusal to produce here in Los Angeles? Remember that the order also has another part which says, must do acts A, B, C and D in Kenya. It didn't just say produce certain records here.

The Court: I understand that, Mr. Larroca, but I take it the Government has chosen to proceed on the theory that the records were not produced before the Grand Jury.

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[50] The Court: What is it that is the violation of the due process?

Mr. Larroca: Many things, all of which—

The Court: Many things, what does that mean? It may mean one thing to you and something else to me. What do you mean by many things?

Mr. Larroca: Let's take one. For example, the fact that the IRS over a long period of time has served a series of administrative subpoenas, has refused to enforce them, has turned to the Grand Jury process to obtain the same information, with it being convinced that Ryan's replies were lies and then pust that proceeding forward to the point where Ryan is faced with a choice as Mr. Miller has [51] indicated of taking action which shows a status which puts him in jeopardy or facing a contempt. That is one.

The Court: Well, Mr. Larroca, does it make any difference in terms of the argument of Mr. Miller whether it was ten years that that happened or that it just happened this one day? I don't think it makes any difference; if Mr. Miller is right in his position with reference to the privilege against self-incrimination in this matter then it doesn't make any difference whether that investigation took ten years or a day, does it?

Mr. Larroca: The period of time does not make a difference.

The Court: Because that is a Fifth Amendment privilege against self-incrimination. Now, what are the due process things that you are talking about?

Mr. Larroca: The abuse of the Grand Jury process.

The Court: I beg your pardon.

Mr. Larroca: The abuse of the Grand Jury process.

The Court: Abuse of the Grand Jury process?

Mr. Larroca: That would be one. Yes, sir.

The Court: In what fashion, Mr. Larroca? If there was an indictment returned against the defendant by the Grand Jury how is that process abused?

[52] Mr. Larroca: I am not talking about the indictment, sir. I am saying that if the IRS does not follow up on its statutory administrative channels to enforce subpoenas but then through cooperation and extensive cooperation with the Justice Department brings itself into a Grand Jury proceeding, in fact the Grand Jury proceeding has the same object according to the Government counsel, to find out the ownership of the Mount Kenya Safari Club. That if this Grand Jury proceeding, and what they are after is to get information for IRS, for what they have refused to follow the statutory method to get, that that is an abuse of the Grand Jury process. When this court implements it, it is an abuse of this court's process.

The Court: Well. you might be interested to know that I happen to feel, unlike other judges, except one that is in Massachusetts, that it is the Grand Jury process which is the proper vehicle for the Internal Revenue to do their criminal investigation and not the summons process.

Mr. Larroca: I am sorry to hear that, your Honor. That is all I can say.

The Court: The Grand Jury at least has some protections which the summons process has none of.

Mr. Larroca: There are a couple of circuits that don't agree with you, your Honor.

The Court: I know that, including the Ninth [53] Circuit, so I follow the circuit reluctantly.

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